The price for each Volume is £1 5s., cloth, net; or £1 8s., half brown calf, net.

THE REVISED REPORTS.

TABLE OF COMPARATIVE REFERENCE.

OLD REPORTS, CASES FROM	*REVISED REPORTS,* CITED AS R. R. *vide* R. R. vols.
Adolphus & Ellis—19 vols.	40, 42 to 48, 50, 52, 54
Anstruther—3 vols.	
Arnold—2 vols.	
Bail Ct. Reports	
Ball & Beatty—2 vo	
Barnewall & Adol	
Barnewall & Alde	
Barnewall & Cress	
Beavan—Vols. 1 to 1	
Bingham—10 vols.	
Bingham, N. C.—6	
Blackstone, H.—2	
Bligh—4 vols.	
Bligh, N. S.—11 Vol	
Bosanquet & Pulle	
Broderip & Bingh	
Campbell—4 vols.	
Carrington & Kir	
Carrington & Mar	
Carrington & Pay	
Chitty—2 vols.	
Clark & Finnelly— 36, 37,	
Collyer—2 vols.	
Common Bench— 68, 6	
Cooper temp. Bro	
Cooper, G.	
Cooper, Pr. Cas.	
Cooper temp. Cot	
Cox—2 vols.	
Craig & Phillips	
Crompton & Jerv	
Crompton & Mees	
Crompton, Meeso	
Daniell	
Danson & Lloyd	
De Gex, MacNag	
De Gex & Smale-	
Davison & Merivale	,,
Dow—6 vols.	,, 14 to 16 & 19
Dow & Clark—2 vols.	,, 35
Dowling—9 vols.	36, 39, 41, 46, 49, 59, 61
Dowling & Lowndes—7 vols.	67, 69, 71, 75, 79, 81, 82
Dowling, N.S.—2 vols.	,, 63, 65
Dowling & Ryland's K. B.—9 vols.	24 to 30
Dowling & Ryland's N. P.	,, 25
Drinkwater	,, 60
Drury	,, 67
Drury & Walsh—2 vols.	,, 56
Drury & Warren—4 vols.	,, 58, 59, 61, 65
Durnford & East—8 vols.	,, 1 to 5
East—16 vols.	,, 5 to 14
Espinasse—6 vols.	,, 5, 6, 8, 9
Exchequer—Vols. 1 to 8.	74, 76, 77, 80, 82, 86, 91
Forrest	,, 5
Gale & Davison—3 vols.	,, 55, 57, 62
Gow	,, 21
Haggard's Adm.—3 vols.	,, 33, 35
Hall & Twell's Chancery—2 vols.	,, 84
Hare—Vols. 1 to 11.	58, 62, 64, 67, 71, 77, 82, 85, 89, 90
Harrison & Wollaston—2 vols.	,, 47
Hodges—3 vols.	,, 42 & 43
Hogan—2 vols.	,, 34
Holt N. P.	,, 17
Horn & Hurlstone—2 vols.	,, 51
House of Lords Cases—Vols. 1 to 3	73, 81, 88
Hurlstone & Walmsley	,, 58
Jacob	,, 23

OLD REPORTS, CASES FROM	*REVISED REPORTS,* CITED AS R. R. *vide* R. R. vols.
Jacob & Walker—2 vols.	,, 20 to 22
3 vols.	,, 68, 69, 72
49, 55, 58, 62, 65, 67, 69, 72, 77, 81, 84, 85, 89	
	,, 44
	,, 38, 40
—9 vols.	,, 25 to 31, 34
—	
36, 37, 39, 41, 42, 46, 49, 52, 56, 63, 66, 70, 73, 80, 83, 87, 90, 91	
)	,, 89
Sugden	,, 46
	,, 35
& Pollock	,, 86
don—3 vols.	,, 84, 86, 87
	15 to 18 & 20 to 23
er—7 vols.	56, 58, 60, 61, 63, 64, 66
—5 vols.	,, 31 to 34
	,, 15 & 17
vols.	,, 14 to 18
	,, 28
ge	,, 29
-17 vols.	5, 56, 58, 60, 62, 63, 67, 69, 71, 73
	,, 15 to 17
	,, 31
—2 vols.	,, 42, 62
s.	,, 19 to 29
1 to 7	43, 46, 50, 59, 70, 79, 83
vols.	,, 29 to 31, 33
ols.	,, 34, 35, 38
ne	,, 51
ols.	,, 43, 45, 48
ols.	,, 36, 39, 41
—6 vols.	,, 38 to 43
vols.	,, 44, 45
	,, 3 & 4
4 vols.	,, 48, 50, 52, 54
	,, 65, 78
	,, 15 to 27
ols. 1 to 18	55, 57, 61, 62, 0, 72, 74, 76, 78, 80, 81, 83, 85, 88
	,, 25 to 29
Russell & Mylne—2 vols.	,, 32, 34
Russell & Ryan	,, 15
Ryan & Moody	,, 27
Schoales & Lefroy—2 vols.	,, 9
Scott—8 vols.	41 to 44, 50, 54
Scott, N. R.—8 vols.	56, 58, 60, 61, 63, 64, 66
Simons—17 vols.	27, 29, 30, 33, 35, 38, 40, 42, 47, 51, 54, 58, 60, 65, 74, 80, 83
Simons, N. S.	,, 89
Simons & Stuart—2 vols.	,, 24 & 25
Smith—3 vols.	,, 7 & 8
Starkie—3 vols.	,, 18 to 20 & 23
Swanston—3 vols.	,, 18 & 19
Tamlyn	,, 31
Taunton—8 vols.	,, 9 to 21
Turner & Russell	,, 23 & 24
Tyrwhitt—5 vols.	,, 35, 37 to 40
Tyrwhitt & Granger	,, 46
Vesey, Jr.—22 vols.	,, 1 to 13
Vesey & Beames—3 vols.	,, 12 & 13
West, H. L.	,, 51
Wightwick	,, 12
Willmore, Wollaston & Davison	,, 52
Willmore, Wollaston & Hodges—2 vols.	52
Wilson's Chy.	,, 18
Wilson's Ex. Eq.	,, 18
Younge	,, 34
Younge & Collyer—4 vols.	,, 41, 47 & 51, 54
Younge & Collyer, C. C.—2 vols.	,, 57, 60
Younge & Jervis—3 vols.	,, 30 to 32

THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW

H. Milner
27 Mch 19

August, 1907.

LAW BOOKS

PUBLISHED BY

SWEET & MAXWELL, LIMITED,

3, CHANCERY LANE, LONDON.

ENCYCLOPÆDIA OF THE LAWS OF ENGLAND, with Forms and Precedents by the most eminent legal authorities. Second edition in 15 or 16 volumes in course of publication.

Full Prospectus and Names of Contributors on Application.

Admiralty.—WILLIAMS and BRUCE'S Admiralty Practice. 3rd Edit. By C. F. JEMMETT and G. G. PHILLIMORE. 32*s*. 1902.

Agency.—A Digest of the Law of Agency. By W. BOWSTEAD. 3rd Edit. 18*s*. 1907.

Annual Practice.—By T. SNOW, CHAS. BURNEY, and F. A. STRINGER. 25*s*. net.

Arbitration and Award.—RUSSELL'S Treatise on Power and Duty of an Arbitrator. 9th Edit. 30*s*. 1905.

Attachment.—Attachment of Debts, Receivers by way of Equitable Execution, and Charging Orders on Stock and Shares. By M. CABABÉ. 3rd Edit. 6*s*. 1900.

Bailments.—WYATT PAINE on Bailments, including Carriers, Pledges, Hire-Purchase, Liens, &c. 25*s*. 1901.

Bankruptcy. — WILLIAMS' Law and Practice in Bankruptcy. 8th Edit. By E. W. HANSELL. 30*s*. 1904.

WACE on Bankruptcy Law and Practice. 27*s*. 6*d*. net. 1904.

Bills of Exchange.—BYLES on Bills of Exchange. 16th Edit. By M. B. BYLES and W. H. B. BYLES. 25*s*. 1899.

Law relating to Cheques. By E. R. WATSON. 3rd Edit. 2*s*. 6*d*. net. 1904.

Building Contracts.—Conditions of Contract. By F. W. MACEY. 15*s*. net. 1902.

HUDSON'S Law of Building, Engineering and Ship-building Contracts. 3rd Edit. 2 vols. By A. A. HUDSON. 2*l*. 12*s*. 6*d*. 1907.

Building Societies.—DAVIS'S (H.F.A.) Law of Building and Freehold Land Societies in England, Scotland and Ireland, &c. 4th Edit. By J. E. WALKER. 21*s*. 1896.

Burials.—BAKER'S Law of Burials. The Law relating to Burials; with Notes, Forms, and Practical Instructions. 6th Edit. By E. LEWIS THOMAS. 25*s*. 1901.

Charities.—TUDOR'S Law of Charities and Mortmain. 4th Edit. By L. S. BRISTOWE, C. A. HUNT, and H. C. BURDETT, Barristers-at-Law. £2 5*s*. net. 1906.

Choses in Action.—The Law relating to Choses in Action. By W. R. WARREN. 16*s*. 1899.

Colonial.—Colonial Laws and Courts. By A. WOOD RENTON and G. G. PHILLIMORE. 15*s*. net. 1907.

Companies.—LINDLEY. A Treatise on the Law and Practice of Joint-Stock and other Companies. By Lord LINDLEY. 6th Edit. By His Honour Judge LINDLEY. 2 vols. 3*l*. 10*s*. 1902.

An Epitome of Company Law, for Students. By W. H. H. KELKE. 6*s*. 1904.

Compensation.—Code of the Law of Compensation under the Lands Clauses and other Acts affecting the Compulsory Purchase or Injurious Affecting of Land. By SYLVAIN MAYER. 38*s*. 1903.

Conflict of Laws.—A Digest of the Law of England with reference to the Conflict of Laws. By A. V. DICEY. 30*s*. 1896.

WESTLAKE, J., K.C., on Private International Law. 4th Edit. 16*s*. 1905.

Constitutional Law. — KELKE'S Epitome of Constitutional Law and Cases. 6*s*. 1907.

Contracts.—CHITTY'S (J., jun.) Treatise on the Law of Contracts. 14th Edit. By J. M. LELY. 30*s*. 1904.

The Specific Performance of Contracts. By W. D. RAWLINS, K.C. 5*s*. net. 1899.

Elements of the Law of Contract. By A. T. CARTER. 2nd Edit. 7*s*. 6*d*. 1907.

Conveyancing. — DAVIDSON'S Concise Precedents in Conveyancing. 18th Edit. By M. G. DAVIDSON. 21*s*. 1904.

Introduction to Conveyancing. By Sir H. W. ELPHINSTONE. 6th Edit. 15*s*. 1906.

KEY & ELPHINSTONE'S Precedents and Forms in Conveyancing. 8th Edit. By Sir H. ELPHINSTONE. 2 vols. 3*l*. 10*s*. 1904.

Student's Precedents in. By JAMES W. CLARK, M.A. 3rd Edit. 6*s*. 1905.

Coroners.—JERVIS (Sir John) Practical Treatise on the Office and Duties of Coroners. With an Appendix of Forms and Precedents. 6th Edit. By RUDOLPH E. MELSHEIMER. 10*s*. 6*d*. 1898.

Costs.—DAYES' Handybook to Solicitors' Costs, showing at a glance the various charges. 2nd Edit. 5*s*. net. 1906.

A

Treatise on the Law of

VENDOR AND PURCHASER

OF

REAL ESTATE AND CHATTELS REAL,

INTENDED FOR THE USE OF

CONVEYANCERS

OF EITHER BRANCH OF THE PROFESSION.

BY

T. CYPRIAN WILLIAMS,

OF LINCOLN'S INN, BARRISTER-AT-LAW, LL.B.; FORMERLY LECTURER ON CONVEYANCING TO THE INCORPORATED LAW SOCIETY OF THE UNITED KINGDOM,

Editor of "Williams on Real Property" and "Williams on Personal Property."

ASSISTED BY

J. F. ISELIN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, M.A., LL.M.

IN TWO VOLUMES.

Vol. I.

THIRD IMPRESSION.

LONDON:

SWEET AND MAXWELL, LIMITED,

3, CHANCERY LANE, W.C.

Law Publishers.

1906.

T
W 6758 v
1906

LONDON:
PRINTED BY C. F. ROWORTH, GREAT NEW STREET—E.C.

RJF 29 Sept 53

To the Memory of

MY FATHER AND MASTER IN THE LAW,

JOSHUA WILLIAMS,

SOMETIME ONE OF THE CONVEYANCING COUNSEL TO THE

COURT OF CHANCERY, AND AFTERWARDS ONE OF

HER LATE MAJESTY'S COUNSEL,

Whose wish it was that his Son should keep his name in

Remembrance in Lincoln's Inn,

This Book

IS AFFECTIONATELY INSCRIBED.

722833

INTRODUCTION.

The writer can hardly put forward a treatise on the law of Vendor and Purchaser of Land without an apology for adventuring upon the field successively occupied by so eminent a Real Property lawyer as Lord St. Leonards, and a writer of such profound knowledge of conveyancing and great literary skill as Mr. Dart. His excuse is that so many years have elapsed and so many and great changes have been made in the law, not only since Mr. Dart first wrote, but even since he himself supervised an edition of his book, that there appears to be room for a re-statement of the principles of the law of sale of land from the standpoint of the present time. Such a statement of the law it has been the writer's aim to make; and he has particularly endeavoured to give a readable account of it.

This book is intended for the use of those engaged in the practice of conveyancing, whether as counsel or solicitors. Its design has therefore been to discuss the incidents of a contract for the sale of land as they are usually presented to the notice of conveyancers; that is to say, in order of time. And the scheme of the work is to treat first of the normal course of such a contract, where it has been made between persons

of full capacity and is duly brought to completion, and to examine afterwards the grounds for avoiding the contract, such as incapacity, mistake, fraud or misrepresentation, and the remedies to be pursued in case of its breach. Thus the book begins with a statement of the law relating to the formation of a contract for the sale of land. It then gives a brief general account of the rights, obligations and remedies of the parties who have concluded such a contract; and the terms of an open contract are particularly set out (*a*) in the same form in which the special provisions of a contract for sale are usually expressed. After this, the usual conditions of sale are dealt with; and the reader's attention is then directed to the vendor's obligation to show a good title and its discharge. The subject of the investigation of title is considered, first generally, and afterwards with regard to a variety of special points or subjects, all of which are of constant occurrence in the work of advising on title. In selecting the subjects to be so discussed and in determining upon their mode of treatment, the writer has necessarily had to take into account the exigencies of the law and practice at the present time; and he has often been constrained to deal at some length with topics which may be thought to be ephemeral, and which would be disposed of by a statement of very different proportion, if he could regard nothing else than the ideal form of a literary composition. Thus he has devoted the whole of one chapter to the subject of devolution on death, and the death duties, regarded from the conveyancer's point

(*a*) Pp. 33, 34 *sq.*

of view. But his reason is that on these subjects the law has been so lately recast by the Land Transfer Act, 1897, and the Finance Acts, that its interpretation has not yet been settled; whilst the questions which are raised by these statutes occur upon almost every title. At the end of the dissertations on particular points arising on the investigation of title, or on particular titles, the main thread of the discourse is again taken up in the chapter on the effect of the contract pending completion. This is followed by an account of the completion of the contract, dealing with the acts to be performed from the time of the acceptance of the title down to the execution of the conveyance.

At this point the first volume concludes, the reader having been conducted throughout the whole of the normal course of a contract for the sale of land. In the second volume it is proposed to treat of the parties' position after completion (as with regard to a want of title not ascertained until after that time) and with the avoidance of the contract and the remedies for the breach thereof, as already mentioned. The second volume will also include a chapter on the sale of registered land, a subject which would have been considered in the present volume, but for the delay in promulgating the new Land Transfer Rules.

The writer has not attempted to compile an encyclopædia of the law of sale of land. His object has been rather to treat of the main principles of the law and practice incident to such sales than to note every special circumstance which may possibly attend them. His belief is that a sound knowledge of these

principles is by far the best aid to the solution of the particular problems which are encountered in practice. And his hope is that, in this respect, his book may be found a useful guide to those gentlemen who are obliged (as constantly happens in small transactions) to advise on difficult questions of conveyancing without the assistance of counsel.

Perhaps the writer may be allowed to say that he has not avoided the discussion of points of law or practice, which are not exactly covered by decided cases, or settled by the opinion of conveyancers or text writers of acknowledged eminence; nor has he hesitated to criticise judicial decisions or *dicta*, which appear to him to be of questionable authority. Thus, he has discussed the following amongst other questions:—Whether, after the acceptance of a bidding at an auction, either party can revoke the authority conferred by him upon the auctioneer to sign a memorandum of the contract (*b*); whether the purchaser's right to a good title is an implied term of the contract or a collateral right (*c*); whether a vendor under an open contract has the right of re-sale on the purchaser's failure to observe the terms of the contract (*d*); whether a voluntary conveyance is a good root of title under an open contract (*e*); at what time the purchase-money is payable on a sale of land situate in a compulsory registration district (*f*); and to what extent the usual remedies for securing payment of a rent-charge in fee are obnoxious to the rule

(*b*) P. 19, note.
(*c*) P. 27, note.
(*d*) Pp. 42—44.
(*e*) P. 89.
(*f*) P. 373.

against perpetuities (*g*). He has tried to elucidate the mystery of what is called "the compound settlement" in connexion with sales under the Settled Land Acts (*h*), and he has respectfully protested (*i*) against the decision in the late case of *Re Cornwallis West and Munro's Contract* (*k*). He has likewise considered the important point—on which, he is aware, his is *vox clamantis in deserto*—whether a conveyance by a tenant for life under the Settled Land Acts can override a mortgage by the remainderman (*l*). And he has adverted to the difficulties now raised where a limited owner pays estate duty out of his own pocket and so becomes entitled to a charge for the amount paid (*m*); with regard to the charge of estate duty on the death of several joint mortgagees not appearing to be trustees (*n*); where a purchaser receives notice of some unregistered process of execution (*o*); and with regard to the effect of orders made in exercise of bankruptcy jurisdiction in creating a charge on land (*p*). He has suggested (*q*) that the assignee of part of land let on lease, who pays the rent for the whole under threat of distress, may have a remedy which was overlooked in the case of *Johnson* v. *Wild* (*r*). And he has criticised the decisions in *Bolton* v. *London School Board* (*s*), *Re Selous* (*t*), *Re Williams and Newcastle's Contract* (*u*) and

(*g*) Pp. 385, 597 *sq.*
(*h*) Pp. 313 *sq.*
(*i*) Pp. 320—323.
(*k*) 1903, 2 Ch. 150.
(*l*) Pp. 323—334.
(*m*) P. 248.
(*n*) Pp. 253—256.
(*o*) P. 515.
(*p*) P. 517.
(*q*) P. 361.
(*r*) 44 Ch. D. 146.
(*s*) 7 Ch. D. 766; below, p. 109, n.
(*t*) 1901, 1 Ch. 921; see p. 410, below.
(*u*) 1897, 2 Ch. 144; see p. 603, below.

the late case of *Re Highett and Bird's Contract* (*x*). Besides this, he has inquired into the advantages of official over private searches (*y*). He has made a strong effort to convince his readers of the great hardship which may befall a purchaser by private contract, whose advisers tamely submit to the incorporation in the contract of the conditions usual on London sales by auction (*z*). He has dealt with the subject of the investigation of title in view of a mortgage (*a*). And he has treated at some length of the law of restrictive covenants (*b*), a subject on which many important decisions have been given during the last few years, and on which the latest leading case (*c*) is of such recent date that it has not yet been reported in the Law Reports. He has moreover taken account, from the outset (*d*), of the additional burthen laid on conveyancers' shoulders by the development of the doctrine, which culminated (*e*) in the extraordinary case of *Scott* v. *Alvarez* (*f*).

(*x*) 1902, 2 Ch. 214; 1903, 1 Ch. 287; see p. 354, below.

(*y*) Pp. 533 *sq.*

(*z*) Pp. 63—74.

(*a*) P. 432.

(*b*) Pp. 426 *sq.*, 571, 589, 592, 596.

(*c*) *Formby* v. *Barker*, C. A. (July 14), 1903, W. N. 133; 72 L. J. Ch. 716; 51 W. R. 646.

(*d*) Pp. 31, 32, 69, 70, 165—171.

(*e*) This doctrine appears to have originated with the case of *Best* v. *Hamand* (1879), 12 Ch. D. 1; see Fry, Sp. Perf. § 1325, p. 592, 3rd ed.

(*f*) 1895, 1 Ch. 596; 2 Ch. 603. This case must have shattered the last ruins of the delusion that law and equity were fused by the Judicature Acts. It appears in truth to be equally destructive of the pretentions put forward by eminent judges (see p. 48, n. (*l*), below), that a contract is really construed in the same manner in equity as at law. In the days when the Courts of Common Law and Chancery were separate, the student's curiosity used to be stimulated by the statement that "on one side of Westminster Hall a man may succeed

It is hoped that this book may be useful, not only to practitioners but also to students preparing for conveyancing practice in either branch of the profession. With this object the author has endeavoured, throughout the work, to write in a manner intelligible to those who have no greater preliminary knowledge of the subject than an acquaintance with the elements of the law of real property and of contract. He may point out that the earlier part of his treatise (Chapters I.—V.), which gives a general account of the subject, is especially adapted to the use of students, and that it is designed to prepare them to understand the rest of the book, in which matters of interest to practitioners are more particularly dealt with. The writer has started with the assumption that his readers will at least have such an acquaintance with the law of real property as may be gathered from a text-book like "Williams on Real Property;" and he has not thought it necessary to repeat here descriptions of those parts of the law, which are explained in that book in an elementary way. Thus he has not inserted an account of the historical progress of the law of creditors' rights (*g*) as an introduction to his discourse about searches (*h*). But he has tried throughout so to

in his suit under circumstances in which he would undoubtedly be defeated on the other side" (Wms. Real Prop. 129, 1st ed.; 177, 13th ed.). But this apparent paradox is eclipsed by the judicial ruling that, in the same Court and cause and in a matter depending on the effect of the same stipulation in the same contract, a suitor may at the same time obtain and be denied substantial relief according as his claim is rested on the doctrines of equity or of law.

(*g*) See Wms. Real Property, Chap. XI., 19th ed.

(*h*) Below, p. 511.

treat his subject that readers may understand, who have no greater knowledge than this.

The writer is conscious of many imperfections in his treatise, and for these he must ask the indulgence of the profession. He has been occupied with the task of its production for several years; but he has only been able to prosecute his undertaking during such time as he could spare from his other work. He will be much obliged if readers, who discover mistakes or omissions, will kindly inform him of them.

Mr. J. F. Iselin is responsible for the correction of the press, except as regards pp. 1—128; and he has undertaken the work of preparing the Index. He has also supplied the writer with many valuable notes for the preparation of Chapter XI., and is affording him the like assistance with regard to certain parts of the second volume. The author has endeavoured to make up for the absence of the Index from Vol. I. by using particular care in compiling the Table of Contents, and by inserting therein references to the pages under each heading.

7, Stone Buildings, Lincoln's Inn,
8th October, 1903.

TABLE OF CONTENTS.

Chap. I.

OF THE FORMATION OF THE CONTRACT OF SALE.

PAGE

Sale defined 1
Requisites of a valid contract 1
Capacity 2
General capacity to buy or sell land 2
Exceptional cases reserved for future consideration 2
Expression of consent 3
Form 3
Consideration 3
Statute of Frauds requiring signed writing 3
The whole agreement must appear from the writing 4
Description of the parties and of the property 4, 5
The memorandum may be made out by several documents 5
Rule as to connecting documents.. 5
The signature required 7
Signature of the party to be charged or his agent sufficient..... 9
Cases where agreement enforceable without compliance with Statute of Frauds 9
1. Sale by Court 9
2. Where defence of statute not taken 9
3. Fraud 10
4. Part performance 10

PAGE

Formation of contract, offer and acceptance 12
Communication 13
Revocation 13
Communication through the post.. 14
Time for acceptance 15
Negotiation of a contract for sale.. 15
Open contract 15
Answering proposals as to sale.... 16
The whole of the correspondence will be looked at 17
Oral agreement 17
Oral acceptance of written offer .. 17
Sale by auction 18
Auctioneer agent to sign 18
Auctioneer's clerk .....18, n.
Question of revocation of the authority to sign .....19, n.
Employment of a puffer at an auction 20
Payment of a deposit 22
Deposit on sales by private contract 23
Stamp on contract for sale of lands 24

Chap. II.

OF THE PARTIES' RIGHTS, OBLIGATIONS AND REMEDIES GENERALLY.

PAGE

Conveyancers' duties on sales 26
Outline of the effect of the contract 27
Whether the right to a good title is an implied term of the contract or a collateral right.....27, n.
Proof of title 29
Requisitions and answers 29
Remedies for breach of the contract 30
1. Action for damages 30
2. Action for specific performance 31
3. Vendor and purchaser summons 32
Statement of the terms of an open contract..... 33
Formal and informal memorandum of an open contract..... 33
The fee simple sold, unless otherwise specified 34

PAGE

Vendor to show a good title 34
Necessity of a good root of title .. 34
Vendor must produce a property identical with that described in the contract 36
Verification of the abstract 37
Purchaser to accept the title, if shown to be good 37
Completion of the purchase 37
Delivery of or statutory acknowledgments, &c. as to muniments of title.....38—40
Time for carrying out the contract 40
Rights of property and possession pending completion 40
Interest payable if completion delayed 41
Has vendor a right of re-sale without express stipulation?..... 42

Chap. III.

OF THE USUAL CONDITIONS OF SALE.

Stipulations usually made on sales by auction..... 46
Reserving right to bid 46
Deposit; signing a memorandum.. 47
Time for completion 47
Time when of the essence of the contract..... 48
Effect of fixing day for completion without further stipulation 49
Fixtures or timber to be taken at a valuation 50
Enforcing contract to sell at a valuation 50
Commencement of title 51
Limiting time for making requisitions 51

Purchaser should ask for abstract . 53
Reservation to vendor of right to rescind the contract 54
Evidence of identity 54
Errors of description; compensation 55
Conveyance 56
Apportionment of rents and outgoings 56
Interest in case of delay in completion 56
Right to re-sell 58
Form of conditions of sale by auction of freeholds in one lot .. 58
Bidding; right to bid reserved.... 58

Chap. III.—*continued.*

PAGE
Deposit; contract to be signed.... 58
Fixtures and timber to be paid for at a valuation 59
Commencement of title 59
Time limit for making requisitions on title, &c. 59
Reservation to vendor of right to rescind the contract 60
Identity 60
No compensation for errors of description 60
Completion 61
Rents, outgoings, &c. 61
Interest 62
Memorandum to be indorsed on the conditions 62
Special conditions of sale 63
Stipulations in formal contracts for private sale 65
Vendor's reasons for not desiring an open contract 67
Points to be considered in settling a private contract 68
Deposit 69
Time for completion 70
Fixtures or timber at a valuation.. 70
Commencement of title 70
Limiting time for making requisitions or objections 71
Reservation to vendor of right to rescind the contract 71
Expense of verification of the abstract 72
Evidence of identity 72
Compensation for errors of description 72
Conveyance 73
Apportionment of rents and outgoings 73
Interest in case of delay in completion 73
Re-sale 74

Chap. IV.

OF THE VENDOR'S OBLIGATION TO SHOW A GOOD TITLE AND ITS DISCHARGE.

§ 1. *Of the general nature of the proof required.*

Origin of the rule that the vendor must show a good title 75
Proof of sixty years' title *primâ facie* proof of a good title 76
Sixty years' title had to be shown, as a rule, in all cases 77
When earlier title could be required 78
1. Advowson 78
2. Long term 78
3. Tithes or property held by Crown grant 78
4. Reversionary interest 78
Vendor and Purchaser Act, 1874.. 79
Forty years' title only now required 79
Other restrictions on purchasers' rights 80
The present law as to showing title 81
Freeholds or copyholds 81
Enfranchised copyholds 81
Leaseholds 81
Lease when intended to mean lease from the freeholder ..... 81, n.
Contract to grant a lease for years 82
Advowson 82
Tithes or property held by Crown grant 82
Reversionary interest 82
Best and the usual evidence of title is production of the title deeds.. 83
Other evidence of title 84
Title depending on Statute of Limitations 85
Vendor must produce the title deeds, if he can 86

Chap. IV.—*continued.*

§ 2. *Of the abstract of title.*

PAGE

Vendor bound to make and deliver an abstract of title 86
What the abstract ought to contain 86
The abstract should commence with a good root of title 87
Reason of the rule requiring a good root of title 87
Whether the abstract must commence with a conveyance for valuable consideration 89
Root of title where the time for showing title is curtailed by special stipulation..... 89
What documents should be abstracted after the root of title .. 90
The manner of making an abstract 92
Execution of deeds, &c. should be stated 94
Tracings of maps or plans..... 94

§ 3. *Of the verification of the abstract.*

Vendor bound to verify the abstract 95
Expense of doing so 95
Of evidence not in vendor's possession..... 95
Evidence required is (1) of documents, (2) of facts..... 96
Proof on sales differs from proof in litigation 96
Proof of documents in Court 96
Documents thirty years old..... 96
Attested documents 97
No evidence of the execution of any document required on sales 97
What is the strict right of a purchaser as to proof of execution of title deeds 98
Documents may be in private or official custody 99
Vendor must produce evidence of documents in official custody .. 99
Expense of proving documents not in vendor's possession 99
Evidence of public document 100
Examined copy 100
Exemplification 100
Office copies 100
Certified copies 101
Proper place for verification of the abstract 101
Expense of examining title deeds not in vendor's possession 102
Deeds in possession of vendor's mortgagees, or other persons than vendor 102
Stamps 103
Evidence of facts required on sales 104
Evidence that certain events, which would certainly have affected the title, did not happen..... 104
Rule as to presumptions of fact.. 106
Events of which the happening may or may not have affected the title 107
Expense of proof of facts..... 108
Recitals and statements in documents twenty years old 109
Criticism of *Bolton* v. *London School Board* .....109, n.
Recitals of documents forming part of the title prior to the time for commencing the abstract..... 110
Recitals no evidence, as a rule; exceptions 110
Recital in a public statute 111
Recitals of fact do not excuse vendor from proof..... 112
Acceptance of irregular evidence.. 113
Great importance of verification of the abstract 114
And of the examination of the deeds with the abstract 114
Proof of identity of property 115
Evidence of particular matters .. 116

Chap. IV. § 3—*continued.*

PAGE
Acknowledgment 116
Act of Parliament..... 117
Award of enfranchisement or inclosure 116, 117
Bankruptcy 118
Copyhold assurances..... 119
Courts, proceedings of 120
Office copies 120
Crown grants..... 121
Deeds 121
Missing documents 121
Enrolment 122
Exchange or partition, order of.. 123
Fine 124
Lease for a year 124
Pedigree, birth 124
Age 124
Marriage..... 124
Death 125
Record in Record Office 126
Recovery..... 126
Registration in Middlesex or Yorkshire..... 126
Seisin 127
Will 127

Chap. V.

OF ADVISING ON TITLE GENERALLY.

Duty of conveyancer advising the purchaser on title 129
What should be the general scope and result of the abstract 130
Vendor need not show the whole estate to be vested in himself, if he have the right to procure its conveyance 130
Distinction between showing a good title on the abstract and proving it 132
Good title not shown, if any estate outstanding in one, whom the vendor has no right to direct to convey 133
Re Bryant and Barningham's Contract 133
Purchaser must at once repudiate the contract, if he wish to insist on this objection 134
Requisitions as to the contents of and manner of making the abstract 135
Estate of grantee to uses..... 137
Identity 138
Calling for evidence of facts 139
Death duties 140
Stamps 140
Inquiries respecting the property sold 140
Vendor bound to answer all relevant questions 143
Re Ford and Hill 143
Course usually taken by counsel advising on title 143
Searches 144
Time for making requisitions.... 144
Want v. *Stallibrass* 144
Re Tanqueray-Willaume and Landau 145
What requisitions should be made and insisted on 146
Where the vendor may rescind .. 147
Where the vendor has no title .. 148
Objection as to matter of conveyance 149
Waiver of objections or requisitions 150
Purchaser desiring to go on where the abstract shows an objection to the title 152

Chap. VI.

OF STIPULATIONS LIMITING THE OBLIGATION TO SHOW A GOOD TITLE.

PAGE

The statutory limitations 153
Sect. 3 (3) of Conveyancing Act, 1881 154
Its effect 155
Phillips v. *Caldeleugh* 156
Nottingham, &c. Co. v. *Butler* 157
Re Marsh and Earl Granville 158
Vendor disclosing a defect of title 160
Misrepresentation 160
Re Banister, Broad v. *Munton* 160
Construction of express stipulations before the Conveyancing Act, 1881 161
Special stipulations as to title.... 163
Hume v. *Bentley* 163
Purchase with notice that a good title cannot be made..... 164
Difference in purchaser's position when resisting specific performance and seeking to recover his deposit..... 165
Best v. *Hamand* 165
Re Davis to Cavey 166
Re National Provincial Bank of England and Marsh 167
Re Scott and Alvarez's Contract .. 167
Recovery of deposit under agreement that title shall commence with some specified instrument which turns out not to be a good root of title..... 169
Purchaser under usual condition as to identity requiring further evidence 171
Course to adopt in making requisitions 171
Conditions requiring assumptions of fact 172
Position of purchaser buying under special conditions as against persons claiming adversely to the vendor 172
Purchaser not investigating title has constructive notice of equities which he might have discovered by inquiry 173

Chap. VII.

OF DEVOLUTION ON DEATH AND THE DEATH DUTIES.

§ 1. *Of devolution on death.*

Devolution on death before 1898.. 174
Dower 174
Curtesy 176
Succession to freeholds after death before 1898..... 176
Estates in fee simple, tail and *pur autre vie* 176, 177
Copyholds 177
Leaseholds 178
Equitable estates 179
Estates held on trust or in mortgage 180
Vendor and Purchaser Act, 1874 . 181
Sect. 30 of Conveyancing Act, 1881 182
Copyholds 183
Liability of real estate to deceased owner's debts..... 183
Executors formerly had no interest in their testator's real estate .. 186
Power for executors to sell real estate might be implied 186
Statutory powers 187
Administrators 189
Land Transfer Act, 1897..... 189
Personal representative trustee for the heir or devisee..... 190
Powers of personal representatives over real estate 190
Liability of real estate to deceased owner's debts..... 191
Personal representatives' assent to devise of real estate 191
Effect of the Act 191
Estates tail..... 195
Equitable estates 195
Copyholds 196
Escheat 197

Chap. VII.—*continued.*

§ 2. *Of the death duties.*

PAGE
Probate duty 198
Leaseholds 199
Purchasers need not inquire as to payment of probate duty..... 199
Legacy duty 200
Leaseholds 200
Legacies charged on real estate, or the proceeds of sale thereof.. 200
Now liable to succession duty.... 201
Succession duty 202
Rates of succession duty .....203, n.
Lands settled for life and over .. 203
Property subject to charitable or public trusts .....203, n.
Devise or descent 204
Joint tenants beneficially entitled 204
Exercise of powers of appointment 204
Increase of benefit by extinction of charge, &c. 204
Succession subject to prior charge, &c. not created by the successor 204
Disposition reserving benefit to the grantor for term of life.... 205
Disposition to take effect at a period ascertainable only by reference to death 205
Immediate disposition subject to secret arrangement that the beneficial ownership shall not pass till death 205
Succession under a disposition made by the successor himself.. 205
Extinction of charge, &c. created by the successor himself 206
Under a resettlement of lands by tenants for life and in tail 206
All succeeding after the tenant for life take under a disposition by the tenant in tail 206
Even though they take under powers created by the re-settlement..... 207
Assessment of succession duty on personalty 207
On real or leasehold property.... 207
Timber .....207, n.

PAGE
Where the successor is a corporation, &c. 208
Property subject to public or charitable trusts 208
Where succession duty now chargeable on the principal value of real or leasehold estate 208
Advowson .....208, n.
Charge of succession duty 209
Succession duty a Crown debt .. 209
Where settled lands are sold under a power of sale 210
Persons accountable for succession duty..... 210
Duty on transmitted successions to personalty 211
Duty payable in respect of interests transferred before the Succession Duty Act 211
After the Act..... 211
Acceleration of title by surrender, merger, &c. 211
Succession devolving by title conferring a new succession 212
Real or leasehold property settled on trust for sale..... 213
Personalty subject to a trust for investment in real or leasehold property 213
Power to compound or commute succession duty 214
Charge of succession duty formerly not barred by lapse of time..... 214
May now be barred as against purchaser or mortgagees 214
Conveyancer's duty as regards succession duty 215
Descent or devise 215
Where lands are settled for successive interests..... 216
Liability to duty created by the disposition 216
Sale of a remainder or reversion.. 216
Sale by tenant for life and remainderman 216

Chap. VII. § 2—*continued.*

PAGE

Sale of settled land under a power of sale 217
Sale under the Settled Estates Act 218
Sale under the Settled Land Act.. 218
Trust for sale..... 218
Election to take *in specie* lands assured on trust for sale 219
Account duty..... 220
Abolition of legacy and succession duty at 1*l.* per cent., where probate or account duty paid .. 222
And where estate duty paid 222
Small estates 222
Additional succession duty 222
Temporary estate duty..... 223
Estate duty 224
Allowance for incumbrances, &c. 224, n.
Exemptions from estate duty 226
1. Trust property 226
2. Transactions for money consideration 226
3. Property of common seamen, &c. 227
4. Sums under 100*l.* payable without representation.. 227
5. Single annuity of 25*l.*..... 227
6. Objects of national, scientific or historic interest given for national purposes, &c. 227
7. Indian Government pensions..... 227
8. Advowson 227
9. Estates not exceeding 100*l.* 227
10. Property settled by disposition of one dying before 2nd August, 1894, if probate or account duty paid or payable 227
11. Where interest in expectancy sold or mortgaged before 2nd August, 1894. 227
12. Settlement by husband or wife on the other of them before 2nd August, 1894. 228

PAGE

13. Reversion to settlor on settlement on himself for life and others, if falling in while settlor entitled in possession 228
14. Reversion on disposition to another or others for life, if falling in in disponer's lifetime 228
15. On death of husband entitled to wife's real or leasehold property in her lifetime 229
16. Objects of national scientific or historic interest, while kept in settlement. 229
17. Persons killed in war 229
Settled property..... 230
Settlement estate duty..... 230
Rate of estate duty 232
Persons accountable for estate duty 233
Estate duty, when payable..... 233
Estate duty on real property 234
Charge of estate duty 234
Power to raise the money 235
Charge in favour of limited owner paying the estate duty..... 235
Certificate of discharge from estate duty 235
Commutation of estate duty on interest in expectancy 236
Composition for any death duties. 236
Estate duty as compared with succession duty 236
Estate duty on sale of lands under a power 238
On sale of remainder or reversion. 239
Charge of estate duty as against purchaser 239
Estate duty not charged on property passing to executor, as such 239
Leaseholds 240
Lands devised on trust for sale .. 241
Lands settled by deed on trust for sale 242
Lands subject to a general power of appointment 243

Chap. VII. § 2—*continued.*

PAGE
General power to charge land with the payment of money .. 243
Property subject to a special power 244
General power of revocation 244
Death of joint tenant 245
Devise to issue dying in testator's lifetime 245
Cesser of contingent interest 245
Death of life tenant under settlement made before the Finance Act, 1894 245
Estate duty, how borne as between those beneficially entitled 245
Where the property passing on death is not the whole estate or interest 247
Certificate of discharge should be required 248
Charge where duty paid by person having a limited interest .. 248

Chap. VIII.

OF NOTICE OF TRUSTS AND SALES BY TRUSTEES.

§ 1. *Of notice of trusts.*

Notice of a trust 249
Mortgage to trustees 250
Course taken on appointment of new trustees 250
Acceptance of statements intended to conceal the fact that mortgagees or owners are trustees.. 251
Notice of a document disclosing the trust 251
Circumstances may make disclosure of a trust unavoidable.... 252
Succession and estate duty on death of one of several mortgagees not appearing to be trustees 253
Notice of a document, how far notice of its contents 256
Notice, actual or constructive.... 257
Restriction on constructive notice by Conveyancing Act, 1882.... 258
Reason for the rule that notice to the agent is notice to the principal..... 259
The exception in case of fraud .. 260
The law previous to the Conveyancing Act, 1882 260
Kennedy v. *Green* 261
Boursot v. *Savage* 262
Atterbury v. *Wallis* 262
Bradley v. *Riches* 263
Sharpe v. *Foy* 263
Cave v. *Cave* 263
Effect of the Conveyancing Act, 1882, s. 3 264
Taylor v. *London and County Bank* . 264
Vendor or mortgagor acting as purchaser's or mortgagee's solicitor 265
What inquiries ought a purchaser to make?..... 265
Notice that property is subject to charges or incumbrances 267

Chap. VIII.—*continued.*

§ 2. *Of sales by trustees.*

PAGE
Sales by trustees 268
Trusts for or powers of sale 268
Time for exercising such a trust or power 268
Acceleration of time for exercising a power or trust 269
Trusts for sale and settlement of the purchase-money 270
Trusts declared by will for sale in order to pay testator's debts .. 271
Executor's power of sale under the Land Transfer Act, 1897 .. 272
Rule against perpetuities in connection with trusts for and powers of sale 272
Order of the Court for administration of the trust 274
Duties of trustees for sale 274
Trustees for sale must sell for money 277
Whether a trust for or power of sale authorizes a mortgage 278
Whether a trust or power to mortgage authorizes a sale, or a mortgage with power of sale . 278
Timber and minerals 279
Trustees should not sell at a valuation 280
Option of purchase 280
What persons, besides the original trustees, can exercise a trust for or power of sale..... 281
As to trusts or powers coupled with an interest..... 281
Survivorship of the trust..... 281
Disclaimer 281
New trustees 282
Trustees appointed by the Court.. 282
Persons succeeding to the estate on the death of a sole or last surviving trustee 282
Heir of sole or surviving trustee.. 283
Devisee 283

PAGE
Personal representatives of sole or surviving trustee 284
Failure of devise of legal estate to trustee..... 285
Question in case of a devise by a sole trustee under the present law 285
Power without an interest 287
Survivorship of powers given to trustees 287
Survivorship of bare powers 287
General rule 287
Powers given to executors 287
Powers arising by implication of law 288
Powers given to trustees 288
Powers given to a class 289
Release and disclaimer of powers . 289
Release of power, where a breach of trust 290
Exercise of a bare power by new trustees 291
By any others after the death of the original donees 291
Trustees exercising a power conferred by a settlement for some purpose provided for in the Settled Land Acts..... 291
Where two or more persons together constitute the tenant for life 294
Estate duty chargeable on land settled on trust for sale 296
Sale of land purchased in breach of trust 296
Trustees' receipts 297
Purchase by trustees 298
What kind of property should be bought by trustees for persons entitled successively 300
Valuation on behalf of trustees selling or purchasing 301

Chap. IX.

OF TITLE UNDER THE EXERCISE OF POWERS.

PAGE

Title depending on exercise of a power of appointment 302
Equitable relief against defective execution of a power 304
Title under a special power of appointment 304
Fraudulent execution 305
Remoteness of limitation..... 305
Attestation clause to instruments exercising powers..... 306
Sale under statutory power..... 307
Sales under the Settled Land Acts 307
As to giving notice of an intended sale 308
As to whether there are trustees of the settlement at the time of sale 309
Who are trustees for the purposes of the Settled Land Acts..... 311
Deposit on sale by auction of settled land..... 313
As to the power of conveyance under the Settled Land Acts .. 313
What is "the settlement"..... 314
Re Ailesbury and Iveagh 314
Re Mundy and Roper's Contract .. 315
The compound settlement 317
Trustees of the compound settlement 317
Principle to determine under what settlement one is tenant for life 320
Criticism of *Re Cornwallis West and Munro's Contract*..... 320
The courses open to a tenant for life after a re-settlement 322
The exceptions to the tenant-for-life's power of conveyance 323
Estates, &c. having priority to the settlement 323
Estates, &c. conveyed or created for securing money actually raised 323
Mortgages by the tenant for life of his life estate..... 324
Mortgages for raising portions, &c. 325
Mortgages by the remainderman. 326

PAGE

Mortgage by tenant for life and remainderman 327
Purchaser from tenant for life should require evidence of the non-existence of estates, &c. which the latter cannot convey. 328
Can a tenant for life ever make a good title under the Settled Land Acts? 331
What the practice has been 333
As to seeing that a tenant for life selling has not committed any breach of his duty as trustee .. 334
Stipulation that the purchaser shall pay the vendor's costs of the sale 335
The statutory powers incapable of assignment or release 337
Bankruptcy of tenant for life.... 337
Release of an undivided share .. 337
Title depending on the exercise of a mortgagee's power of sale .. 338
Title under a mortgagee's statutory power of sale..... 340
Waiver of any particular restriction on the exercise of a mortgagee's power of sale 342
Mortgagor's concurrence cannot be required..... 342
What estate the mortgagee can convey..... 342
Copyholds 343
Title under the power of sale given to mortgagees by Lord Cranworth's Act 343
Conveyance by mortgagee selling under Lord Cranworth's Act .. 344
Mortgagee selling under power of sale bound only to act in good faith..... 344
Sale by mortgagee in possession after mortgagor's title barred.. 346
Sale after foreclosure absolute .. 346
Sale pending foreclosure or redemption proceedings 346
Purchase of foreclosed property.. 347

Chap. X.

OF PARTICULAR TITLES.

§ 1. *Sale of copyholds.*

PAGE
What the purchaser is entitled to require on sale of copyholds .. 348
Where no tenant on the rolls 349
What fines payable and by whom 349, 350

§ 2. *Sale of leaseholds.*

Leaseholds 351
Lease from the freeholder must be shown unless otherwise agreed.. 351
Covenants more onerous than usual an objection to title unless disclosed 351
Evidence that a lease held subject to a condition of re-entry has not determined 352
Waiver of forfeiture by receipt of rent 353
Purchaser buying leaseholds with notice of a breach of covenant that cannot or will not be remedied 354
Criticism of *Re Highett and Bird's Contract* 354
Sale of land held by underlease .. 357
Sale of leaseholds not assignable without the landlord's licence.. 358
Where landlord's consent not to be unreasonably withheld 360
Sale of part of land held by lease for years 360
Johnson v. *Wild* 361
Sale of leaseholds in lots 362

§ 3. *Sale of lands in a register county or compulsory registration district.*

Lands in Middlesex or Yorkshire.. 362
Effect of an unregistered assurance 363
Wills 365
Yorkshire Registries Act, 1884 .. 366
Exceptions 367
Wills of leaseholds 367
Lands registered in the Land Registry 368
Lands in a district where registration of title is compulsory on sale 369
Leaseholds 371
Sale of unregistered land situate in a compulsory district 372

§ 4. *Voluntary conveyances.*

Voluntary conveyances, how defeasible 373
Leaseholds 374
Where title is made under a voluntary conveyance 375
Estate duty, when payable on death of grantor by voluntary conveyance 376

§ 5. *Sale of ground rents, reversions and remainders.*

Purchase of ground rents..... 377
Effect of grant of reversion..... 379
Severance of reversion 380
Reversions or remainders on an estate of freehold 381
Succession and estate duty after purchase of reversions or remainders 382

Chap. X.—*continued.*

§ 6. *Sale of purely incorporeal hereditaments.*

PAGE

Sale of purely incorporeal hereditaments 383
Contract to grant an incorporeal hereditament *de novo* 383
Rent-charge 383
Perpetual rents, when redeemable 384
Remedies of owners of rents 384
Covenant to pay a rent-charge .. 384
Proviso for re-entry on non-payment of rent-charge 385
Release of part of land subject to a rent-charge 385

PAGE

Registration of a rent-charge, where necessary 386
Land charges .....386 & n.
Tithe rent-charge 388
Lands sold as tithe-free 388
Advowson 388
Benefices Act, 1898 390
Prohibition as to sales of advowsons by auction 392
Right of presentation pending completion of sale of an advowson 392
Devices formerly used on sale in expectation of a vacancy 392

§ 7. *Sale of charity lands.*

Points to be considered on purchase of charity lands 393
Requisites of the conveyance of land to charitable uses 394
Assurance by registered disposition under the Land Transfer Acts 396
Enrolment of separate deed of trust 396
Power to enrol instruments not enrolled within due time 396
No power to amend other defects than want of enrolment 397
The assurance will be void though the charitable trusts be not disclosed 397
The charity may gain title under the Statutes of Limitation 398

To what interests in land the Mortmain and Charitable Uses Act extends 398
Assurance of personal estate to be laid out in purchase of land for a charity 398
Exemptions from the requirements of the Mortmain Acts 399
Gift of land by will to a charity.. 402
Restriction on the sale, mortgage, or leasing of charity lands 404
Disposition of charity lands by authority of the Charity Commissioners 407
Assurance of lands purchased from a charity 408

§ 8. *Partnership property.*

Sale of land which is partnership property 409
Devolution on death of land which is partnership property 410

Criticism of *Re Selous* .....410, n.
Disposition of land which is partnership property 411

Chap. X.—*continued.*

§ 9. *Sale by order of the Court.*

PAGE
Title under an order for sale made by the Court 413
Jurisdiction of the Court to order a sale of land .....414 & n.
What interests are bound by an order for sale 415
Conveyance of the legal estate .. 416
The order should have been duly made, and must be properly carried out 417
Order of the Court not to be invalidated for want of jurisdiction 418

§ 10. *Sale of an equity of redemption.*

Risks on purchase of an equity of redemption 419
Prior equities, consolidation, tacking.....420, 421
What inquiries the purchaser should make 421
Notice to the mortgagee 421, 422
Purchaser of equity of redemption paying off the first mortgage .. 423
Purchase by mortgagee of the equity of redemption 424

§ 11. *Sale of licensed property.*

Obligations of vendor of licensed property 425
Time of essence of the contract .. 425

§ 12. *Land subject to restrictive covenants.*

Restrictive covenants a defect of title 426
Devolution of the burthen of restrictive covenants..... 427
Covenants to do some positive act on land 427
Creation of restrictive stipulations on sale of building estate..... 428
On lease of such an estate 429
Devolution of the benefit of restrictive covenants 430
Loss of right to enforce them.... 431

§ 13. *Investigation of title in view of a mortgage.*

Intending mortgagor in a different position from purchaser 432
He should stipulate for payment of his costs in any event 433
Not an implied term of an agreement for a mortgage that mortgagor shall show a good title .. 433
Enforcement of contract to lend or borrow on mortgage 434
What title should be required on behalf of a mortgagee 434
Good marketable title 435
Evidence of title in view of a mortgage 436
Title on transfer of mortgage.... 436

Chap. XI.

OF THE EFFECT OF THE CONTRACT PENDING COMPLETION.

§ 1. *Of the rights and liabilities of the parties pending completion in respect of the property sold.*

PAGE

Effect of the contract in equity .. 438

Subject to vendor's duty to show title, his lien, and right to possession until the proper time for completion, the lands are the purchaser's.....438 *sq.*

Conversion 439

The vendor's trusteeship..... 439

Losses and improvements pending completion 440

Destruction by fire pending completion of a house insured by the vendor 442

Rights of the parties and the insurance office in respect of the policy 442

Purchaser should insure himself against fire..... 446

Vendor's duty to take care of the property sold 446

Repairs, &c. 446

Vendor entitled to retain possession until actual completion .. 448

Vendor's liability to account for the rents..... 449

PAGE

The vendor's beneficial interests pending completion 450

Vendor's lien 450

His right to the profits 451

What profits he may take 451

He must not diminish the value of the inheritance 452

He may be restrained from disposing of the legal estate to the purchaser's prejudice 452

Vendor remaining in possession after the date fixed for completion 452

Vendor's duty to discharge the outgoings 454

Apportionment of outgoings 457

Purchaser taking possession before completion 457

Purchaser already in possession as vendor's tenant 458

Orders for purchaser in possession to pay price into Court or give up possession 459

§ 2. *Of the transfer pending completion of the rights and liabilities under the contract.*

Transfer pending completion of the rights and liabilities under the contract 461

Death of the vendor 461

Devolution of the vendor's estate. 462

Freeholds in fee..... 462

Estate tail 465

Sale by tenant in tail under the Settled Land Acts..... 465

Copyholds 466

Leaseholds 467

Conversion of the land sold in the vendor's hands 467

Option to purchase .....468 & n.

Conveyance of deceased vendor's estate by vesting order..... 469

Death of vendor who sold under a power 471

Contracts for the sale of settled land under the Settled Land Acts 472

Devolution of the burthen of the contract on the vendor's death . 473

Chap. XI. § 2—*continued.*

PAGE

Death of the purchaser 473
Purchaser's heir or devisee now takes subject to the vendor's lien 475
Test of the property devolving as land on the purchaser's death.. 476
Devolution of the burthen of the contract on the purchaser's death 477
Bankruptcy of either party to the contract 477
Bankruptcy of the vendor 479
Act of bankruptcy by the vendor. 480
Insolvent vendor when discharged from liability on the contract .. 482
Vendor an undischarged bankrupt at the time of the contract 483
Bankruptcy of the purchaser 484
Act of bankruptcy by the purchaser 484
Adjudication of bankruptcy against the purchaser 486
Insolvent purchaser when discharged from liability on the contract 488
Purchaser an undischarged bankrupt at the time of the contract 488
Land taken in execution pending completion 489

PAGE

Notice of unregistered process of execution 491
Lunacy 491
Marriage of either party to the contract 493
Conviction of treason or felony .. 495
Outlawry 495
Party becoming an alien enemy.. 495
Assignment by a party to the contract..... 496
Assignment by the vendor of the land sold..... 496
To purchaser for value without notice 496
Tacking by vendor's alienee 498
Alienation by the purchaser of the land sold..... 499
Assignment of the benefit of the contract 499
Shaw v. *Foster* 500
As to the burthen of the contract after an assignment 501
Transfer of part of the benefit of the contract 501
Browne v. *London Necropolis Co.* .. 502
Contract specifically enforceable against persons whose estate would be displaced by a conveyance 503

Chap. XII.

OF THE COMPLETION OF THE CONTRACT.

§ 1. *Of completion generally.*

Time for completion 506
Where time of the essence of the contract .....506—508
Making time of the essence, where not originally so, by subsequent notice 508
Time for performance by vendor of a condition which is a term of the sale 509
The acts to be performed on either side for completion 509
The purchaser's duties..... 510
Acceptance of the title..... 510
Searches and inquiries to be made by the purchaser 510

Chap. XII.—*continued.*

§ 2. *Of searches and inquiries.*

PAGE

Searches, their object 511
Judgments, Crown debts and writs of execution 511
Land Charges Act, 1900 511
Notice of judgments or Crown debts of record or by specialty or public accountantship 515
Crown debts by simple contract.. 515
Notice of unregistered process of execution 515
Orders made in exercise of bankruptcy jurisdiction 517
Annuities or rent-charges 517
Notice of life annuities 518
Land charges..... 518
Notice of unregistered land charges 519
Land improvement charges created before 1889..... 519
Land improvement charges not requiring registration before 1889 522
Statutory charges on land of a principal sum, not payable by way of annuity 522
What are land charges created after 1888 522
Lis pendens 523
Lands in Lancashire or Durham.. 524
Bankruptcy 524
Deeds of arrangement 524
Disentailing assurances 526
Deeds acknowledged..... 526
Search in Middlesex and Yorkshire Registers 527
Copyholds 527

PAGE

What searches should usually be made 527
1. Writs and orders affecting land 527
2. *Lis pendens*..... 527
3. Life annuities 527
4. Bankruptcy 527
5. Deeds of arrangement.... 528
6. For registration of title .. 528
7. Land charges 528
8. Middlesex or Yorkshire Registers..... 528
9. Court rolls..... 529
10. On purchase of land from a company 529
Against what names searches should be made 530
No obligation on purchaser to search 533
Search is notice 533
Duty of purchaser's solicitor to search 533
Official searches..... 533
Official searches for disentailing deeds, and in the Yorkshire and Middlesex Registries 536
Inquiries to be made before completion..... 536
As to statutory charges 536
As to discharge of outgoings payable by the vendor 538
Ascertaining that possession is in accordance with the title..... 538
Inquiry of tenants and occupiers as to their interest 538
Inspection and survey of the property 539
Purchaser's rights before and after completion in respect of vendor's innocent misrepresentation 540
Purchaser buying without inspection must accept patent, but not latent defects 540

Chap. XII.—*continued.*

§ 3. *Of the preparation of the conveyance.*

PAGE
Preparation of the conveyance .. 541
Who are necessary parties to the conveyance 542
Intermediate trustees 543
Incapacity of any party to the conveyance 544
Parties to the conveyance on the grantee's side 544
Conveyance to the purchaser's nominee 544
To sub-purchaser 544
Form of the conveyance 546
Sale of lands subject to incumbrances 547
The usual stipulation as to the costs of conveyance 548
Discharge of incumbrances on sale by payment into Court 549
Vendor should never be allowed to obtain the legal estate..... 550
Purchase followed by an immediate mortgage 552
Purchaser receiving notice of mesne incumbrances..... 553
Framing the conveyance..... 555
Recitals 555
Parcels..... 557
Description independent of or by reference to a plan 558
Connecting a new description with the old..... 558
Mortgagees and trustees convey by the description under which they took 558
Trustee-mortgagees gratuitously releasing part of their security . 560
General words 561
What easements or other privileges the purchaser can require to be conveyed to him 563
Where vendor may limit the effect of the statutory general words . 563
Whether purchaser may claim an express grant of an easement impliedly sold 564
Reservations in the vendor's favour 565

PAGE
Where the property is sold subject to some incumbrance 567
Effect of this as regards the statutory covenants for title..... 567
Sale of such estate as the vendor has 570
Vendor's qualified covenants for title confer no indemnity against eviction by title paramount.... 571
Sale of land subject to restrictive covenants 571
How far vendor may be bound by restrictive stipulations 571
Estate clause 572
Limitation of the purchaser's estate 573
Limitation to grantee to uses 574
Limitation by deed of equitable estates in land 574
Vendor of land bound to give the usual covenants for title 575
No warranty of title now implied, as a rule, by the conveyance of land 577
False representation by vendor that he is the owner of the land sold 577
Sale by trustee as such..... 578
By mortgagee as such 578
By *cestui que trust* or mortgagor.. 578
By trustee in bankruptcy 578
Sale under power 579
Sale by trustees for sale 580
Sale by order of the Court 580
The statutory covenants for title. 581
Their limitation or variation 582
Devolution of the benefit thereof . 582
Covenants for title on sale of an equitable estate 583
Covenants for title obtained by fraud 584
Purchaser may take either express or the statutory covenants for title 585
Covenants for title on sale on copyholds 586

Chap. XII. § 3—*continued.*

PAGE

Where the land sold is to be conveyed subject to any incumbrance 587
Covenants for title intended to cover an apparent defect 588
Purchaser agreeing to observance of restrictions on the use of the land bought must enter into an absolute covenant to that effect 589
In what cases the purchaser is bound to indemnify the vendor. 590
On sale of leaseholds..... 590
Indemnity on sale of land subject to restrictive covenants 592
Indemnity on sale of land subject to a charge for which the vendor will remain liable 595
Sale in consideration of a rent-charge 595
To what remedies the vendor is entitled 595
Sale partly in consideration of an agreement by the purchaser to build 596
Whether the usual remedies for securing a rent-charge in fee are void for remoteness 597
Power of re-entry to satisfy arrears 597
Power to limit a term 598
Power of re-entry by way of forfeiture 599
Criticism of *Re Hollis' Hospital and Hague* .....600, n.
Power on breach of covenant to enter and hold until performance thereof 602
Delivery of title-deeds on completion 602
What documents must be handed over 602
Criticism of *Re Williams and Newcastle's Contract* 603
Vendor who has covenanted to produce the deeds 605
Vendor who has given a statutory acknowledgment and undertaking 605
Sale of land in lots 605

PAGE

Vendor's duty to furnish statutory acknowledgments and undertakings 606
What documents should be included in a statutory acknowledgment..... 606
Statutory declarations 608
Where the purchaser will have the legal right to enforce an existing covenant or acknowledgment for production 609
Vendor must, as a rule, give both acknowledgment and undertaking 610
Exceptions 611
Proper acknowledgment and undertaking can only be given by the person retaining possession of the documents 612
Sale by mortgagor with mortgagee's concurrence 612
Person in constructive possession of documents 613
Acknowledgment, whether to be given by separate document .. 614
Endorsement of memorandum on conveyance 615
Expenses of acknowledgment and undertaking 616
Liability created by acknowledgment or undertaking 616
Endorsement of receipt on conveyance 616
Settling the conveyance 617
Conveyancing etiquette 617
Stamps on conveyance 617
Meaning of conveyance on sale in Stamp Act, 1891.....618, 619
How *ad valorem* duty to be calculated in respect of stock and securities..... 619
How consideration consisting of periodical payments to be charged 619
How conveyance in consideration of a debt, &c. to be charged .. 620
Duty on conveyance in separate parcels of property sold for one consideration 620

Chap. XII. § 3—*continued.*

PAGE

On conveyance in separate parcels of property bought for one consideration by or for several persons 620
Where there are several instruments of conveyance for completing one sale 620
Sub-sale by purchaser before conveyance 620
Conveyance in separate parcels after a sub-sale 621
Where sub-purchaser has taken a conveyance of the purchaser's interest 621
As to sale of annuity or right not before in existence 621
Conveyance by several instruments 621
Copyholds conveyed by deed 621
By surrender 621
Sale of an equitable interest in lands 621
Of equity of redemption 622
Stamp duty on foreclosure 622
Conveyance in consideration of a rent-charge 623
Conveyance partly in consideration of improvement or covenant to improve 623
Where several transactions are carried out by one instrument.. 624
Where incumbrances are got in by the conveyance 624
Or prior to conveyance..... 625
Expense of stamping 625

§ 4. *Of the adjustment of accounts.*

Apportionment of rent on completion..... 626
Of outgoings 627
Of land tax and tithe rent-charge 628
Sale of land subject to a rent attaching thereon and on other land 629
Sale of reversion of part of land let at one rent 629
Purchaser's liability to pay interest 630
Under an open contract 630
Under the stipulation usual on London sales 631
Contract to pay interest in case of delay from any cause 632
To pay interest except in case of vendor's wilful default..... 632
To pay except on vendor's default 633
Purchaser in default to pay interest 633
Items chargeable against or for vendor..... 634
Compensation for errors of description 634
Claims to compensation under an open contract 634
The vendor's position at law and in equity..... 635
The purchaser's right to specific performance with compensation 636
Exceptions 637
Condition excluding any right to compensation for errors of description 639
Condition allowing compensation; the vendor's rights 639
Re Fawcett and Holmes 640
The rule in *Flight* v. *Booth* 640
Extent of the condition for compensation 641
Debenham v. *Sawbridge* 642
Purchaser's rights under condition providing for compensation.... 643
Neither party can enforce specific performance with an indemnity 644
Costs of the sale and of conveyance 644

Chap. XII.—*continued.*

§ 5. *Of the execution of the conveyance.*

PAGE
Completion 648
Attestation of the conveyance by a witness of the purchaser's choosing 649
Vendor must convey in person .. 649
Power of attorney when revoked . 649
Execution of the conveyance by attorney 650
Execution of some title deed by attorney 651
To whom the purchase-money should be paid 651
Solicitor's authority to receive the purchase-money on production of the conveyance 652
On a sale by trustees 652
Where the conveyance is executed by attorney..... 653
Payment should be made to the solicitor acting for the person entitled to give a receipt 654
Payment to solicitor ostensibly acting for a conveying party .. 655
King v. *Smith*..... 655
The deed must be produced at the time of payment 655
Payment to the solicitor's clerk .. 655
What is a proper payment 656
Effect of the execution of the conveyance 656

APPENDIX.

Form of Contract for Private Sale of Freehold Land, with Stipulations not settled exclusively in the Vendor's Interest 659

ABBREVIATIONS.

Sug. V. & P. ....The 14th edition is referred to, unless otherwise stated.
Dart, V. & P.....The 6th edition is referred to, unless otherwise stated.

THE LAW

RELATING TO

VENDOR AND PURCHASER OF LANDS.

CHAPTER I.

OF THE FORMATION OF THE CONTRACT OF SALE.

Sale defined.

The subject of the present treatise is the sale of real estate and chattels real, or the formation and completion of contracts for the conveyance of land or other hereditaments in consideration of a price in money (*a*).

Requisites of a valid contract.

Now in order to create a valid contract, that is, an agreement enforceable at law, it appears that there must be:—

(1.) Due capacity to contract on the part of the persons entering into the agreement;

(2.) The expression by all parties of a common intention to create an obligation binding some or one of them; that is, an intention that some or one of them should do or forbear something affecting their legal relations for the benefit of the others or other of them;

(3.) Due compliance with the forms or the presence of other matter required to make a promise enforceable by English law, beyond the mere expression of a common intention;

(*a*) See Wills, J., *J. & P. Coats* v. *Commissioners of Inland Revenue*, 1897, 1 Q. B. 778, 783.

(4.) Nothing unlawful in the object of the agreement;
(5.) True, full and free consent of the parties; that is, consent unimpeachable as having been induced through mistake, misrepresentation, fraud, duress or undue influence (*b*).

Capacity.

Applying ourselves to the first of these elements of contract, it is to be observed that, in order to form a valid contract for the sale of land, the parties must have, not only capacity to make contracts generally but also due capacity to buy and sell land. As a general rule, all natural persons enjoy either capacity: but there are exceptions in the case of infants, persons of unsound mind, drunken persons, married women and convicts. Outlaws, too, and alien enemies are disabled by their incapacity for bringing actions from enforcing though not from making contracts (*c*). And corporations are limited in their capacity for buying and selling land (*d*). There are also cases in which the formation of an unimpeachable contract for the sale of land is prevented by the relation existing between the vendor and purchaser, as in the case of trustee and *cestui que trust*, solicitor and client (*e*). All these exceptional cases are reserved for subsequent consideration; and it is proposed first to examine the formation, incidents and usual course of a contract for sale of land made between persons of full contractual capacity; and to treat afterwards of any grounds for impeaching the contract. For the present therefore we will pass over the first, fourth and fifth of the above-mentioned elements of a valid contract, and devote our attention to the second and third, namely, the expression of consent, and its form.

General capacity to buy or sell land.

Exceptions—

—reserved for future consideration.

(*b*) Wms. Pers. Prop. 150, 14th ed.

(*c*) Bac. Abr. Outlawry, D. (3), Aliens, D.: Co. Litt. 129 b; Pollock on Contracts, 94, 95, 4th ed.

(*d*) Wms. Real Prop., Pt. I. Chap. XII. pp. 275 *sq.*, 18th ed.

(*e*) See 1 Dart, V. & P. 22, 35.

Expression of consent.

The common intention or consent of the parties to an agreement may be expressed either by their uniting in a set form of written or spoken words, or by the acceptance by some or one of them of an offer made to them or him by the others or other of them (*f*). As to the forms or other matter required to make a promise enforceable by English law beyond the mere expression of a common intention, the main rule is that the contract must be evidenced by deed or else there must be a consideration for the promise (*g*). In contracts for the sale of land the element of consideration is always present. The promise on the vendor's part to convey the land to the purchaser is made in consideration of the purchaser's promise to pay the price, and *vice versâ*. So that a contract for sale of land, though it be not made by deed, fulfils the requirements of English law, in so far as consideration is essential to its validity. A contract for sale of land is however one of those contracts on which the law imposes a requisite of form besides the element of consideration. For by the fourth section of the Statute of Frauds (*h*), no action shall be brought to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some person by him thereunto lawfully authorized. So that *writing* and *signature by the party to be charged or his agent* are necessary to make a contract for the sale of land enforceable at law (*i*).

Form.

(*f*) Wms. Pers. Prop. 152, 14th ed.

(*g*) Ibid. 153.

(*h*) Stat. 29 Car. II. c. 3.

(*i*) The writing required by the fourth section of the Statute of Frauds need not be executed with pen and ink; the note of the agreement may be made in pencil or print, by engraving, lithography or photography, or "in any other mode of representing or reproducing visible words." And the signature of the party to be charged or his

The whole agreement must appear from the writing.

Contracts for the sale of land are generally concluded, on a sale by private treaty, by the signature by both parties or their agents of a formal written contract; and on a sale by auction, by the purchaser or his agent signing a memorandum embodying formal conditions of sale, which the auctioneer also signs as agent for the vendor. But such contracts may also be established by informal written memoranda or letters signed by the party to be charged therewith or his agent. So that a binding contract may result from the acceptance in writing duly signed of an offer to sell land. It is essential, however, whether the writing given in evidence be of a formal or an informal nature, that the terms of the agreement sought to be proved thereby should be sufficiently ascertained therein (*j*). The parties to the contract (*k*) and the property to be sold must therefore be sufficiently described (*l*), and the price, or the means of ascertaining it, be stated (*m*); and any other terms of the bargain (except, of course, such as are implied by law, as that a good title shall be shown (*n*)) must be defined (*o*).

Description of the parties.

With regard to the question, What is a sufficient description of the parties to the contract, or the property to be sold? the rule is *id certum est quod certum reddi potest* (*p*). Thus a man may be sufficiently identified by reference to some character which he fills, if there

agent may be affixed by any similar means. See *Schneider* v. *Norris*, 2 M. & S. 286; *Geary* v. *Physic*, 5 B. & C. 234; *Bennett* v. *Brumfitt*, L. R. 3 C. P. 28; *Deneh* v. *Deneh*, 2 P. D. 60; *Tourret* v. *Cripps*, 48 L. J. N. S. Ch. 567; stat. 52 & 53 Vict. c. 63, s. 20.

(*j*) *Seagood* v. *Meale*, Prec. Ch. 560; *Wain* v. *Warlters*, 5 East, 10; *Blagden* v. *Bradbear*, 12 Ves. 466, 471.

(*k*) *Williams* v. *Lake*, 2 E. & E. 349.

(*l*) See next paragraph.

(*m*) *Milnes* v. *Gery*, 14 Ves. 400; *Elmore* v. *Kingscote*, 5 B. & C. 583, 584; *Morgan* v. *Milman*, 3 De G. M. & G. 24.

(*n*) See *Fowle* v. *Freeman*, 9 Ves. 351.

(*o*) *Cooper* v. *Hood*, 26 Beav. 293; *Van Praagh* v. *Everidge*, 1903, 1 Ch. 434.

(*p*) *Rossiter* v. *Miller*, 3 App. Cas. 1124, 1141.

can be but one answer to the inquiry, To whom does the description apply (*q*)? So that the description of a vendor as the proprietor, owner or mortgagee of certain land is good enough (*r*). But if the description be so vague that it does not necessarily apply to some particular person, it is insufficient. Thus it is not enough to describe the party to a contract of sale as the vendor of certain property, or as the client or friend of a named agent (*s*). The same general rule is applied in determining the sufficiency of the description of the property sold, parol evidence being admissible in either case to elucidate the description (*t*).

Memorandum may be made out by several documents.

Rule as to connecting documents.

The memorandum required by the Statute of Frauds need not be contained in one document; it may be made out from several documents, if they can be connected together. It was formerly laid down that, in order to connect two documents together so as to establish a sufficient memorandum to satisfy the Statute of Frauds, one must contain some reference to the other (*u*). But later cases have established a wider rule, which appears to be this:—You are entitled to explain by parol evidence the meaning of any general expression used in any document (*v*). If therefore you have a document, signed by a party to be charged, which refers to an agreement made by him, but in such terms that the description of the agreement is obviously incomplete, you are entitled to give evidence to show

(*q*) *Potter* v. *Duffield*, L. R. 18 Eq. 4, 7; *Carr* v. *Lynch*, 1900, 1 Ch. 613.

(*r*) *Sale* v. *Lambert*, L. R. 18 Eq. 1; *Rossiter* v. *Miller*, ubi sup. So the descriptions "the executors of A." (*Hood* v. *Lord Barrington*, L. R. 6 Eq. 218), "a trustee for sale of certain property" (*Catling* v. *King*, 5 Ch. D. 660) have been held sufficient.

(*s*) *Potter* v. *Duffield*, ubi sup.; *Jarrett* v. *Hunter*, 34 Ch. D. 182; *Powell* v. *Jones*, 1905, 2 K. B. 11.

(*t*) *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Shardlow* v. *Cotterell*, 20 Ch. D. 90, 98; *Plant* v. *Bourne*, 1897, 2 Ch. 281, as to which, *quære* whether the decision of Byrne, J., were not sounder than that of the C. A.

(*u*) *Ridgway* v. *Wharton*, 3 D. M. & G. 677, 693-7, per Cranworth, C., who changed his mind, *S. C.*, 6 H. L. C. 238, 256: dissenting judgment of Williams, J., *N. Staffordshire Ry.* v. *Peek*, E. B. & E. 986, 1000-3.

(*v*) *Bainbridge* v. *Wade*, 16 Q. B. 89.

what that agreement is, and if the evidence so adduced comprise another document containing all the terms of the agreement, or the terms not specified in the first document, the two documents may be read together as a memorandum sufficient to satisfy the Statute, although the evidence connecting them be parol evidence only (*w*). But if a signed document contain a reference to an agreement made by the signer in such terms that a complete agreement is described, and no explanation of the terms of the document is required on the face of it, the party seeking to charge the signer is not entitled to give parol evidence that the agreement is other than is described, although the signer may prove by parol evidence that the agreement described in the writing does not contain some term of the agreement into which he entered, and so avoid the contract under the Statute of Frauds (*x*). To give examples:—Parol evidence has been admitted to connect a signed letter referring to an agreement to purchase land with another document giving the terms of purchase (*y*); to connect a letter promising to "grant the extension of lease you solicit" with another letter showing the day on which the term granted by the lease was to expire (*z*); to show that the "instructions" to a solicitor referred to in a letter were a written memorandum containing fully the terms of the agreement sought to be enforced (*a*); to connect a letter containing a promise to grant a lease for fourteen years "at the rent and terms agreed upon" with another

(*w*) *Ridgway* v. *Wharton*, 6 H. L. C. 238; *Baumann* v. *James*, L. R. 3 Ch. 508; *Long* v. *Millar* 4 C. P. D. 450; *Shardlow* v. *Cotterill*, 20 Ch. D. 90; *Studds* v. *Watson*, 28 Ch. D. 305; *Oliver* v. *Hunting*, 44 Ch. D. 205; *Sheers* v. *Thimbleby*, 13 Times L. R. 451.

(*x*) *Hinde* v. *Whitehouse*, 7 East, 558, 569, 570; *Kenworthy* v. *Schofield*, 2 B. & C. 945; *Pierce* v. *Corf*, L. R. 9 Q. B. 210; *Rishton* v. *Whatmore*, 8 Ch. D. 467.

(*y*) *Western* v. *Russell*, 3 V. & B. 187. See also *Cave* v. *Hastings*, 7 Q. B. D. 125 (reference to "our arrangement for the hire of your carriage").

(*z*) *Verlander* v. *Codd*, T. & R. 352.

(*a*) *Ridgway* v. *Wharton*, 6 H. L. C. 238.

document in which such rent and terms were specified (*b*); and to show that the purchase referred to in a signed receipt for 31*l.* "as a deposit of the purchase" of certain land was an agreement for purchase of which the terms were contained in a memorandum signed by the purchaser (*c*). So if one write a letter saying, "I accept your offer," there is no doubt that this may be shown by parol evidence to refer to another letter previously received, in which the terms of the offer are fully stated, so that a complete contract in writing may be established by the two letters read together (*d*). Similarly, parol evidence has been admitted to connect a letter addressed "Dear Sir" only with the envelope in which it was enclosed, and on which the purchaser's name was written (*e*). On the other hand, memoranda of sales written in auctioneers' books in terms, which needed no explanation, have been held insufficient to satisfy the Statute, on the ground that they contained no reference to special conditions on which the sales were made (*f*).

The signature required.

The signing contemplated by the Statute appears to be writing the name (*g*) of the party to be charged or

(*b*) *Baumann* v. *James*, L. R. 3 Ch. 508.

(*c*) *Long* v. *Millar*, 4 C. P. D. 450; see also *Studds* v. *Watson*, 28 Ch. D. 305; *Oliver* v. *Hunting*, 44 Ch. D. 205; in which cases writings referring to "the purchase-money" were allowed to be explained by parol evidence and so connected with other documents containing the remaining terms of the purchase.

(*d*) Bramwell, L. J., *Long* v. *Millar*, 4 C. P. D. 450, 454; Field, J., *Cave* v. *Hastings*, 7 Q. B. D. 125, 128; Kekewich, J., *Oliver* v. *Hunting*, 44 Ch. D. 205, 209.

(*e*) *Pearce* v. *Gardner*, 1897, 1 Q. B. 688.

(*f*) *Hinde* v. *Whitehouse*, 7 East, 556, 569, 570; *Kenworthy* v. *Schofield*, 2 B. & C. 945; *Peirce* v. *Corf*, L. R. 9 Q. B. 210; *Rishton* v. *Whatmore*, 8 Ch. D. 467.

(*g*) The party's usual signature, with initials for the Christian names, will do; *R.* v. *Avery*, 18 Q. B. 576. Writing the initials only of the Christian name and surname, or even making a mark, appears to be a sufficient signature, if the signer be otherwise sufficiently described in the memorandum; *Selby* v. *Selby*, 3 Mer. 6; *Hubert* v. *Moreau*, 12 B. Moore, 216, 219. And it seems that signature by initials only may be enough without any other description of the signer, parol

his authorized agent (*h*), so as to authenticate the memorandum (*i*). And as the Statute requires signing only and not subscribing, it does not much matter in what part of the document the signature is placed, provided the name be inserted in such a manner as to govern the whole memorandum (*j*). Thus in the case of memoranda drawn up in the third person, the mention of the names of the parties at the beginning has frequently been held to be a sufficient signature (*k*). So writing a person's name at the head of a memorandum of an agreement, to which he is a party, has been held to be a sufficient signature (*l*). But where a name inserted in the body of a memorandum relates only to particular sentences, it cannot be regarded as a signature of the whole document (*m*). And writing the names of the parties in a memorandum of agreement (even so as to govern the whole) will not be considered to be signing, if the terms of the instrument show that the parties intended it to be authenticated by further signature (*n*). If, however, the terms of a memorandum, in which the parties' names are inserted, leave a doubt, whether

evidence being admissible to identify him; *Chichester* v. *Cobb*, 14 L. T. N. S. 433; cf. *Sweet* v. *Lee*, 3 Man. & Gr. 452, 460. But signature by mark alone without name or description is open to the objection that the memorandum is incomplete in not showing the party to be charged; *Hubert* v. *Moreau*, 2 C. & P. 528. A description, which may be sufficient to identify the person described as a party to the agreement (see ante, p. 4), may not be sufficient to constitute his signature of the memorandum; *Selby* v. *Selby*, 3 Mer. 2.

(*h*) *Phillimore* v. *Barry*, 1 Camp. 513; *White* v. *Proctor*, 4 Taunt. 209.

(*i*) *Stokes* v. *Moore*, 1 Cox, 219.

(*j*) *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Lobb* v. *Stanley*, 5 Q. B. 574; *Caton* v. *Caton*, L. R. 2 H. L. 127, 143.

(*k*) See cases cited in preceding note: and *Propert* v. *Parker*, 1 Russ. & My. 625; *Bleakley* v. *Smith*, 11 Sim. 150.

(*l*) *Schneider* v. *Norris*, 2 M. & S. 286: *Evans* v. *Hoare*, 1892, 1 Q. B. 593, where note that the letter was written by the defendants' clerk by their authority, and then presented to the plaintiff for signature; so as that the defendants' name was actually written by their authorized agent; *Sims* v. *Landray*, 1894, 3 Ch. 318.

(*m*) *Stokes* v. *Moore*, 1 Cox, 219; *Caton* v. *Caton*, L. R. 2 H. L. 127.

(*n*) *Hubert* v. *Treherne*, 3 Man. & Gr. 743; *S. C.*, *nom. Hubert* v. *Turner*, 4 Scott, N. R. 486.

further signature was intended, parol evidence is admissible to show that either party made, authorized or adopted such signing of his name as his signature (*o*).

Signature of party to be charged, or his agent, sufficient.

The memorandum mentioned in the 4th section of the Statute of Frauds is required to be signed by the party to be charged, or his agent. It is settled that the other party need not sign the memorandum, in order to enforce the agreement; it is sufficient that he be ready and willing to perform his part of the contract (*p*). An agent authorized to sign a memorandum of contract for his principal need not, it is held, be thereunto authorized in *writing* (*q*). And agreements made without complying with the requirements of the Statute are held to be, not void, but only not enforceable (*r*).

Cases where agreement enforceable without compliance with Statute of Frauds.

1. Sale by Court.

2. Where defence of Statute not taken.

An oral agreement for the sale of land may be enforced in certain exceptional cases, although the requirements of the Statute of Frauds have not been complied with. These are, first, where the sale is made by the Court, when the judicial character of the proceedings is held to preclude the danger of the mischief, which the Statute was intended to prevent (*s*). Secondly, according to the present practice, the defence of non-compliance with the requirements of the Statute of Frauds must be specially pleaded in an action upon a contract (*t*). So that if one sued in respect of an oral agreement for the sale of land omit to plead the defence of the Statute, the

(*o*) *Johnson* v. *Dodgson*, 2 M. & W. 653; see also *Schneider* v. *Norris* and *Evans* v. *Hoare*, ubi sup., which were decided upon this principle; *Hucklesby* v. *Hook*, 82 L. T. 117.

(*p*) *Laythoarp* v. *Bryant*, 2 Bing. N. C. 735; *Reuss* v. *Picksley*, L. R. 1 Ex. 342.

(*q*) *Waller* v. *Hendon*, 5 Vin. Abr. 524, pl. 45; Sug. V. & P. 145; *Sims* v. *Landray*, 1894, 2 Ch. 318.

(*r*) *Leroux* v. *Brown*, 12 C. B. 801.

(*s*) *A.-G.* v. *Day*, 1 Ves. sen. 218, 221; Sug. V. & P. 109; Dart, V. & P. 227, 1329-30; Fry, Sp. Perfce. 262.

(*t*) R. S. C. Order 19, r. 15; *Clarke* v. *Callow*, 46 L. J. N. S. Q. B. 53; see *Odhams* v. *Brunning*, 12 Times L. R. 303, reversed 13 Times L. R. 65.

agreement may be established either by the admission of its existence in the defendant's pleading (*u*), or if not so admitted by oral evidence (*v*). And the Courts will now enforce an agreement so established, whether the relief claimed be the specific performance of the contract or damages for its breach (*w*). Thirdly, an agreement may be established by oral evidence, notwithstanding the terms of the Statute of Frauds, where it would be a fraud to repel proof of the agreement under cover of the Statute (*x*). Thus if an absolute conveyance of land be obtained under an oral agreement for a mortgage, the mortgagee will not be allowed to set up the Statute of Frauds as a defence to an action to enforce the right of redemption (*y*). So if one be induced to sign a written contract for the sale or purchase of land on the faith of some variation being made in the terms of the written agreement or of the performance of some collateral stipulation, oral evidence of the variation or stipulation so agreed upon will not be excluded by reason of the Statute (*z*). So where it is arranged that an agreement made orally shall be put into writing, but

3. Fraud.

(*u*) See R. S. C., Order 19, rr. 13-20.

(*v*) *Olley* v. *Fisher*, 34 Ch. D. 368; *James* v. *Smith*, 1891, 1 Ch. 384.

(*w*) Under the old Chancery practice, an oral agreement would be specifically enforced, if it were admitted by the defendant's answer, and he did not insist on the Statute; *Limondson* v. *Sweed*, Gilb. 35; *Gunter* v. *Halsey*, Amb. 586; *Ridgway* v. *Wharton*, 3 De G. M. & G. 677, 689-692. But at common law, it was not necessary or proper to plead the Statute *specially*. If the defendant pleaded the general issue (that is, a general denial of the contract), the plaintiff had to establish a contract enforceable at law; and if he failed to prove compliance with the Statute of Frauds, the defendant might then raise the defence of the Statute; see *Buttemere* v. *Hayes*, 5 M. & W. 456, 460; *Leaf* v. *Tuton*, 10 M. & W. 393. And see *Futcher* v. *Futcher*, 45 L. T. N. S. 306.

(*x*) Eldon, C., *Mestaer* v. *Gillespie*, 11 Ves. 627-8; *Rochefoucauld* v. *Boustead*, 1897, 1 Ch. 196, 206.

(*y*) 1 Eq. Ca. Abr. 20, pl. 5; *Walker* v. *Walker*, 2 Atk. 101; *England* v. *Codrington*, 1 Eden, 169; *Lincoln* v. *Wright*, 4 De G. & J. 16, 22; *Douglass* v. *Culverwell*, 3 Giff. 251; 4 De G. F. & J. 20.

(*z*) See *Pember* v. *Mathers*, 1 Bro. C. C. 52; *Clarke* v. *Grant*, 14 Ves. 519; *Jerris* v. *Berridge*, L. R. 8 Ch. 351; Fry, Sp. Perfce. 264, 372.

this is prevented by the fraud of one of the parties, he will not be allowed to avail himself of the defence of the Statute (*a*). Fourthly, if an oral contract for the sale of land be partly performed by one of the parties thereto, that may preclude the other from setting up the defence of the Statute of Frauds to an action under the equitable jurisdiction of the Courts for the specific enforcement of the contract (*b*). For it is held in equity that when there has been part performance of an oral contract for the sale of land which, as we have seen, is not *void* (*c*) the parties are to be charged not so much upon the contract (*d*) as upon the equities arising from the acts of performance. The case is considered to have gone beyond the stage of mere contract and therefore to be outside the mischief aimed at by the Statute; and in order to do justice between the parties, oral evidence of the contract is admitted (*e*). But to have this effect, the acts of part performance must, according to the authoritative phrase, be "unequivocally and in their own nature referable to some such agreement as that alleged" (*f*). That is to say, the acts must be such that the existence of an agreement such as alleged is the only reasonable inference therefrom; they must be not only consistent with the contract asserted but referable to no other title (*g*). The acts moreover must be such as would render it a fraud to raise the defence of want

4. Part performance.

(*a*) *Maxwell* v. *Montacute*, Prec. Ch. 526. But unless there be fraud, an oral agreement to put in writing and sign the terms of a contract regulated by the 4th section of the Statute of Frauds cannot be enforced; *Wood* v. *Midgley*, 5 De G. M. & G. 41, 45; see Fry, Sp. Perfce. 267; *Johnston* v. *Boyes*, 42 Sol. J. 610; on further proceedings, 1899, 2 Ch. 73.

(*b*) See Selborne, C., *Maddison* v. *Alderson*, 8 App. Cas. 467, 474 et seq. A party sued for damages on an oral contract under the common law jurisdiction of the Courts is not precluded from raising the defence of the Statute on account of part performance of the contract; *Lavery* v. *Pursell*, 39 Ch. D. 508, 518.

(*c*) Ante, p. 9.

(*d*) See the words of the Statute; ante, p. 3.

(*e*) See *Maddison* v. *Alderson*, 8 App. Cas. 475-8.

(*f*) *Maddison* v. *Alderson*, 8 App. Cas. 479.

(*g*) See *Wills* v. *Stradling*, 3 Ves. jun. 378, 381; *Morphett* v. *Jones*, 1 Sw. 172, 181.

of signed writing (*h*). The terms of the agreement, of which the existence is so inferred, must be duly proved by oral evidence. And the agreement so proved must be a contract enforceable (in all respects save the absence of signed writing) under the equitable as distinguished from the common law jurisdiction of the Courts (*i*). To give examples, taking possession of land under an oral agreement for the purchase or lease of it is the strongest case of an act of part performance raising the equity in question. For "the acknowledged possession of a stranger in the land of another is not explicable save on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract" (*j*). But mere holding over by a tenant whose term has expired is not unequivocally referable to a new contract with his landlord (*k*). So payment of part and possibly the whole of the purchase-money is not sufficient to let in oral evidence of a contract for the sale of land; for "the payment of money is an equivocal act, not (in itself), until the connection is established by parol testimony, indicative of a contract concerning land" (*l*).

Offer and acceptance.

In regard to the expression of the parties' consent, the formation of a contract for the sale of land is governed by the general law of contract, subject of course to the requisite of form (*m*) (namely, signed writing), which has just been considered. Thus in order that the accept-

(*h*) *Buckmaster* v. *Harrop*, 7 Ves. 341, 345; Redesdale, Ir. C., *Clinan* v. *Cooke*, 1 Sch. & Lef. 22, 41; *Mundy* v. *Joliffe*, 5 My. & Cr. 167, 177.

(*i*) *Britain* v. *Rossiter*, 11 Q. B. D. 123; *McManus* v. *Cooke*, 35 Ch. D. 681; *Lavery* v. *Pursell*, 39 Ch. D. 508, 518; Fry, Sp. Perfce. 275-8.

(*j*) Plumer, M. R., *Morphett* v. *Jones*, 1 Sw. 181; and see Jessel, M. R., *Ungley* v. *Ungley*, 5 Ch. D. 887, 890.

(*k*) *Wills* v. *Stradling*, 3 Ves. jun. 381; *Maddison* v. *Alderson*, 8 App. Cas. 480.

(*l*) *Maddison* v. *Alderson*, 8 App. Cas. 478-9.

(*m*) Ante, p. 3.

ance of an offer (*n*) may make a contract, it is essential that there should be *communication* of the offer and its acceptance to each party respectively (*o*), and the acceptance must be absolute and identical with the terms of the offer (*p*). If therefore you offer to sell me your land, though I make up my mind to accept, there is no contract between us until I duly signify to you my acceptance. And this will be the case, even though you state in your offer that, unless you hear from me, you will consider the matter as concluded; for though you may indicate to me the manner in which my acceptance shall be signified, you are not at liberty to stipulate that my acceptance shall be implied, if I do nothing (*q*). Again if I offer to sell you my land for 1,000*l.*, an answer that you will give 950*l.* for it is no acceptance of my offer, but a counter-proposal on your part; it is a rejection of my offer; and if I should decline your proposal, you would not be at liberty to bind me by accepting my terms, unless I had renewed my offer to you (*r*). An offer may be revoked (*s*) at any time before its acceptance be duly communicated to the proposer: but, as in the case of acceptance, mere change of mind is not enough to revoke an offer; the change must be communicated to the other party (*t*). When the acceptance of an offer is duly communicated to the proposer, the contract is completely formed, and neither

Communication.

Revocation.

(*n*) See ante, p. 3.

(*o*) *Felthouse* v. *Bindley*, 11 C. B. N. S. 869; *Dickinson* v. *Dodds*, 2 Ch. D. 463; *Brogden* v. *Metropolitan Ry. Co.*, 2 App. Cas. 666, 691-2.

(*p*) *Hyde* v. *Wrench*, 3 Beav. 334; and see *Felthouse* v. *Bindley*, ubi sup.; *Bonnewell* v. *Jenkins*, 8 Ch. D. 70.

(*q*) See cases cited in last note but one.

(*r*) *Hyde* v. *Wrench*, 3 Beav. 334.

(*s*) Or varied, variation being a revocation and new offer; *Honeyman* v. *Marryat*, 21 Beav. 14, 20, affd. 6 H. L. C. 112.

(*t*) *Byrne* v. *Van Tienhoven*, 5 C. P. D. 344, 347; *Henthorn* v. *Fraser*, 1892, 2 Ch. 27, 31, 32, 36. It appears, however, that an offer may be effectually revoked, if the proposer has distinctly signified his change of mind and this come to the knowledge of the other party, though the proposer did not make the communication; *Dickinson* v. *Dodds*, 2 Ch. D. 463.

Communication through the post.

party is at liberty to recede (*u*). Here we may notice that, where the parties are in communication through the post, or where the post is the natural channel for sending the answer to a proposal of contract, acceptance of the offer is held to be duly signified when a letter of acceptance is *posted* (*v*). So that the proposer is bound, notwithstanding that the letter be delayed in the post beyond the time when he naturally expected to receive it (*w*), and even though the letter be lost in the post and he never received it (*x*); and he cannot withdraw his offer after a letter accepting it has been posted to him (*y*). This is a rule of convenience, and its best explanation seems to be that a proposer making an offer, to which he might naturally expect the answer to be sent by post, must be taken, if not to have authorized that mode of communication, at least to have accepted its usual conditions and risks. Posting a letter of acceptance of such an offer is therefore considered as a compliance with the conditions of the offer as regards the signification of acceptance (*z*). It follows that the acceptor ought not to be prejudiced by anything which may occur after his letter has been posted. Thus it would be unjust, and it would be impossible to carry on business through the post, if the proposer were allowed to withdraw in the interval between the posting of the acceptance and its arrival. So delay or loss of a letter in the post is no fault of the sender, who parts with all control over it when it is posted; and he ought not to suffer therefrom (*a*). This doctrine, it should be stated,

(*u*) *Adams* v. *Lindsell*, 1 B. & A. 681; *Byrne* v. *Van Tienhoven*, *Henthorn* v. *Fraser*, ubi sup.

(*v*) See *Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216; *Henthorn* v. *Fraser*, 1892, 2 Ch. 27; *Re London and Northern Bank*, 1900, 1 Ch. 220.

(*w*) *Dunlop* v. *Higgins*, 1 H. L. C. 381.

(*x*) *Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216, *diss.* Bramwell, L. J.

(*y*) *Re Imperial Land Co. of Marseilles, Harris's Case*, L. R. 7 Ch. 587; *Byrne* v. *Van Tienhoven*, 5 C. P. D. 344; *Henthorn* v. *Fraser*, 1892, 2 Ch. 27.

(*z*) See *Henthorn* v. *Fraser*, 1892, 2 Ch. 27.

(*a*) See the cases cited in the five preceding notes.

has no application in the case of the revocation of an offer; which, if communicated by post, only takes effect when the letter actually reaches the person to whom it is addressed; for the revocation of an offer is not a matter which its recipient can be expected to contemplate, and his acceptance of the exigencies of postal communication cannot be inferred (*b*). In order to bind the proposer, an offer must in general be accepted within a reasonable time after it is made (*c*). What is a reasonable time is of course a question of fact in each particular case (*d*). Here it may be noticed that a promise to keep an offer open for a particular time is unenforceable for want of consideration (*e*); so that an offer accompanied by such a promise may be withdrawn, provided it has not been accepted, before the time specified has elapsed (*f*).

Time for acceptance.

Owing to the above-mentioned provisions of the Statute of Frauds, the object of all negotiations as to the sale of land is to arrive at an agreement, not merely expressed orally, but put into writing and signed. And it is usually desired, on the vendor's part at least, not to enter into an open contract (that is, a contract simply ascertaining the parties, the property to be sold and the price and leaving the other terms to be implied by law), but to modify by express stipulation the legal incidents of the bargain. For as we shall see, the law imposes on every vendor of land the duty of strictly proving his title; and it is not often advisable that he should undertake his full legal liabilities in this

Negotiation of a contract for sale.

Open contract.

(*b*) See the cases cited in note (*y*) to p. 14, ante.

(*c*) *Rummens* v. *Robins*, 3 De G. J. & S. 88; *Ramsgate Victoria Hotel Co.* v. *Montefiore*, L. R. 1 Ex. 109.

(*d*) See *Dunlop* v. *Higgins*, 1 H. L. C. 381.

(*e*) *Cooke* v. *Oxley*, 3 T. R. 653. If the promise be made by deed or for valuable consideration, it is of course enforceable.

(*f*) *Routledge* v. *Grant*, 4 Bing. 653; *Dickinson* v. *Dodds*, 2 Ch. D. 463; *Henthorn* v. *Fraser*, 1892, 2 Ch. 27.

respect (*g*). Thus a formal contract for the sale of land generally contains special stipulations of a technical character. It is therefore very necessary for those who negotiate the sale of land to understand the principles of the formation of contract. The main thing to remember is that unconditional acceptance of an offer makes a contract, to which no new term can be added, and from which neither party can recede, except by the consent of both: whilst any acceptance, which is conditional on the variation of some term of the offer, is really a new proposal, and must in its turn be accepted by the other party before a contract is formed (*h*). Any one, who receives an offer of sale or purchase, to which he is favourably inclined, should make up his mind before answering whether he wishes to conclude an immediate contract or merely to signify his assent that the terms proposed shall form the basis of a future contract. In the former case he should accept unconditionally and in the simplest words; for instance, "I accept the offer contained in your letter of such a date." In the latter event he should be very careful to express plainly his intention to give a provisional assent only and not to be bound until all the terms of a future agreement have been settled. The best way to do this is to state clearly that the intended contract may contain other terms than those provisionally accepted; to say, for example, "I am willing that the terms of purchase proposed in your letter dated, &c. shall form the basis of a future contract between us to be approved by my solicitor and to contain such stipulations as he may

Answering proposals as to sale.

(*g*) It is frequently desirable that a vendor should limit by express stipulation the time for which he is to show title; and it is always advisable that he should reserve to himself the power of rescinding the contract if the purchaser should insist on any requisition as to title which he is unable or unwilling to comply with.

(*h*) See the cases cited ante, p. 13; and *Chinnock* v. *Marchioness of Ely*, 4 De G. J. & S. 638; *Crossley* v. *Maycock*, L. R. 18 Eq. 180.

advise me to insert therein" (*i*). For if an offer be accepted with the suggestion that a formal contract shall be prepared but without expressing any intention that the terms proposed shall or may be varied thereby, the acceptance is practically unconditional and the contract is formed at once (*j*). Here we may notice that, when it is sought to establish a contract by letters which have passed between different parties, the Court will take into consideration the whole of the correspondence which has passed, and will not draw the line at any particular letter or letters, which might have afforded evidence of a contract, if considered apart from the rest (*k*). Where an agreement for the sale of land is made by word of mouth, an enforceable contract is of course not made until a proper memorandum of the agreement be written out and signed by one of the parties (*l*). But an offer in writing specifying all the terms of a proposed agreement and signed by the proposer may be accepted orally, and will then be a sufficient memorandum of the contract to bind him under the Statute of Frauds (*m*).

The whole of the correspondence will be looked at.

Oral agreement.

Oral acceptance of written offer.

(*i*) See *Winn* v. *Bull*, 7 Ch. D. 29, where an agreement as to terms of lease, "subject to the preparation and *approval* of a formal contract," was held not to constitute a contract, the reference to the *approval* of the formal contract being considered to imply contemplation of the possibility of introducing new terms; *Hawkesworth* v. *Chaffey*, 55 L. J. Ch. 335. As to the effect of a stipulation for the approval of one's solicitor, see *Bartlett* v. *Greene*, 30 L. T. N. S. 553; *Hudson* v. *Buck*, 7 Ch. D. 683; *Hussey* v. *Horne Payne*, 8 Ch. D. 670, 4 App. Cas. 311, 322; *Clack* v. *Wood*, 9 Q. B. D. 276.

(*j*) See *Fowle* v. *Freeman*, 9 Ves. 351; *Lewis* v. *Brass*, 3 Q. B. D. 667; *Bonnewell* v. *Jenkins*, 8 Ch. D. 72; *Hucklesby* v. *Hook*, 82 L. T. 117. When an offer is accepted in writing with a reference to the preparation of a formal contract, it is of course a question of the construction of the particular document, whether the acceptance is unconditional or not. If not, it is merely a counter-proposal and no contract is made. See the cases cited in this and the two preceding notes, and *Vale of Neath Colliery Co.* v. *Furness*, 45 L. J. N. S. Ch. 276; *Harvey* v. *Barnard's Inn*, 50 L. J. N. S. Ch. 750; *North* v. *Percival*, 1898, 2 Ch. 128 (*quære* if rightly decided; *Winn* v. *Bull*, 7 Ch. D. 29, was not cited).

(*k*) *Hussey* v. *Horne Payne*, 4 App. Cas. 311, 316; *Bristol, Cardiff and Swansea Aërated Bread Co.* v. *Maggs*, 44 Ch. D. 616, a case in which, after there had been unqualified acceptance of an offer, the parties continued to negotiate about other terms of their agreement.

(*l*) See ante, pp. 3, 11, n. (*a*).

(*m*) *Reuss* v. *Picksley*, L. R. 1 Ex. 342; *Lever* v. *Koffler*, 1901, 1 Ch. 543.

Sale by auction.

With regard to the formation of the contract on the sale of land by auction, a bidding at an auction is no more than an offer, and no contract is created until that offer is accepted by the auctioneer, as the vendor's agent; acceptance being signified by the fall of the auctioneer's hammer. As an offer is revocable before acceptance, a person bidding at a sale by auction may audibly retract his bidding at any time before the fall of the hammer (*n*). For this reason a stipulation that no bidding shall be retracted is almost invariably made. It seems however that such a condition cannot be enforced (*o*). For, as Lord St. Leonards pointed out (*p*), to hold that an action would lie on an implied undertaking not to retract a bidding would be an invasion of the before-mentioned provision of the Statute of Frauds (*q*), whereby no action shall be brought to charge any person upon any contract or sale of lands, unless the agreement be in writing and signed by him or his agent. And sales by auction are within the Statute (*r*). On a sale by auction the auctioneer is held to be the agent both of the vendor and the purchaser for the purpose of signing a memorandum of the contract. This authority is given by the vendor by his appointment of the auctioneer to conduct the sale. In the case of the purchaser, the agency is conferred by the acceptance of his bidding, which is considered to imply an offer of such authority (*s*). The vendor may

Auctioneer agent to sign.

(*n*) *Payne* v. *Cave*, 3 T. R. 148.

(*o*) Such a condition made on a sale by the Court has been held to bind the solicitor of a mortgagee, who consented to the sale but was not a party to the suit; *Freer* v. *Rimmer*, 14 Sim. 391.

(*p*) Sug. V. & P. 14; 1 Dart, V. & P. 139.

(*q*) Ante, p. 3.

(*r*) *Blagden* v. *Bradbear*, 12 Ves. 466.

(*s*) *Emmerson* v. *Heelis*, 2 Taunt. 38; *White* v. *Proctor*, 4 Taunt. 209; *Kemeys* v. *Proctor*, 1 J. & W. 350; Sug. V. & P. 42, 43, 147; Fry, Sp. Perfce. 251. The auctioneer cannot delegate his authority in this respect. For vendor or purchaser to be bound by the signature of the auctioneer's clerk, he must have authorized the clerk to sign for him. It seems that such authority may be implied on the part of the vendor from his appointment of the auctioneer, the usual course of business being for the clerk to

Auctioneer's clerk.

of course revoke the authority given to the auctioneer at any time before the bidding is accepted (*t*). There is no doubt that if property be knocked down to any one at an auction and the auctioneer sign a memorandum of the sale, neither vendor nor purchaser can then withdraw his authority from the auctioneer (*u*). And it is said that after the fall of the hammer neither party can revoke the auctioneer's authority to sign for him (*v*). If however after a sale by auction the vendor or the purchaser refuse to sign a memorandum of the contract

take down the names. But it has been held that no similar authority can be implied on the part of the purchaser from his bidding; *Bell* v. *Balls*, 1897, 1 Ch. 663. If, however, either party assent in any way to the clerk's signature on his behalf, he is bound. See *Bird* v. *Boulter*, 4 B. & Ad. 443; *Peirce* v. *Corf*, L. R. 9 Q. B. 210; *Dyas* v. *Stafford*, 7 L. R. Ir. 590, 602; Sug. V. & P. 146; 1 Dart, V. & P. 209; Fry, Sp. Perfce. § 530; *Sims* v. *Landray*, 1894, 2 Ch. 318, where the purchaser stood by while the auctioneer's clerk inserted his name in the memorandum.

(*t*) See *Warlow* v. *Harrison*, 1 E. & E. 295, 309; *Johnston* v. *Boyes*, 1899, 2 Ch. 73.

(*u*) See the cases cited at the beginning of the last note but one. The authority given by implication to the auctioneer is, however, to sign immediately after the sale, and if this be not done it will cease; *Bell* v. *Balls*, 1897, 1 Ch. 663.

(*v*) 1 Dart, V. & P. 209; Fry, Sp. Perfce. § 530. This proposition is countenanced by the decision of Kekewich, J., in *Van Praagh* v. *Everidge*, 1902, 2 Ch. 266, 270, reversed on other grounds, 1903, 1 Ch. 434; by the fact that in *Mason* v. *Armitage*, 13 Ves. 25, 37, a memorandum signed by an auctioneer was considered to bind the vendor at law, though he swore in his answer that he had revoked the auctioneer's authority before such signature; and by the fact that in *Day* v. *Wells*, 30 Beav. 220 (approved by Stirling, J., *Bell* v. *Balls*, 1897, 1 Ch. 672), an argument against specific performance, that the vendor so revoked the auctioneer's authority, was held to call for no reply. In *Mason* v. *Armitage* and *Day* v. *Wells*, however, the actual decision was that, if there were a contract enforceable at law, specific performance thereof would not be enforced in equity on account of circumstances of mistake. And if one authorize another to sell his land privately, and the agent make an oral contract for sale, the principal may withdraw his authority at any time before the agent signs a written contract on his behalf; *Farmer* v. *Robinson*, 2 Camp. 339, n.; Sug. V. & P. 146. If in the case of a private sale made orally by an agent, the policy of the Statute of Frauds is sufficiently strong to prevail over the general principle that agency cannot be revoked after the agent has so acted under his authority as to induce a third party to alter his legal position (as to which, see Story on Agency, §§ 466-8), it is difficult to see why a sale by auction should be governed by a different rule; especially when the publicity of an auction is expressly held to be no reason for excluding the operation of the statute; *Blagden* v. *Bradbear*, 12 Ves. 466.

and the auctioneer will not sign for him, it is difficult to see what remedy the other party has to enforce his bargain. For, as we have seen, apart from fraud, an agreement to put into writing and sign a contract for sale of land cannot be enforced (*w*). And in the absence of a signed memorandum no action lies to charge any person upon the contract for sale (*x*).

Employment of a puffer at an auction.

Under the present law, if a puffer, that is, a person engaged to bid on the vendor's behalf in order to prevent a sale at an undervalue or to force up the price, be employed without the vendor having expressly reserved to himself the right to bid, the sale will be invalid. At common law it was well settled that the employment of puffers or of a single puffer on the vendor's behalf rendered the sale void on the ground of fraud, where it had been announced that the sale would be without reserve or that the highest bidder should be the purchaser (*y*). In equity however there was authority to the effect that the employment of a single puffer, to prevent a sale at an undervalue, would not invalidate the sale, unless the property were expressly or impliedly offered for sale without reserve (*z*): though Lord Cranworth, in *Mortimer* v. *Bell* (*a*), doubted whether he would be bound to hold that the rule, which had been established at common law, did not hold good in equity. The law is now settled by the Sale of Land by Auction Act, 1867 (*b*), whereby it is enacted (*c*) that whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law. The

(*w*) Ante, p. 11, n. (*a*).

(*x*) *Blagden* v. *Bradbear*, 12 Ves. 466.

(*y*) *Howard* v. *Castle*, 6 T. R. 642; *Thornett* v. *Haines*, 15 M. & W. 367; Sug. V. & P. 9, 10; *Green* v. *Baverstock*, 10 Jur. N. S. 17; *Mortimer* v. *Bell*. L. R. 1 Ch. 10.

(*z*) *Smith* v. *Clarke*, 12 Ves. 477; *Woodward* v. *Miller*, 2 Coll. 279; Sug. V. & P. 9, 10; 1 Dart, V. & P. 224.

(*a*) L. R. 1 Ch. 10, 16.

(*b*) Stat. 30 & 31 Vict. c. 48.

(*c*) Sect. 4.

Act also provides (*d*) that the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person. And it is further enacted (*e*) that, where any sale by auction of land is declared either in the particulars or conditions of such sale to be subject to a right for the seller to bid, it shall be lawful for the seller or any *one* person on his behalf to bid at such auction in such manner as he may think proper. It has been held, under this Act, that if it be stated that land will be sold by auction subject to a reserved price or bidding, without saying that a right to bid is reserved, it is not lawful to employ a puffer to bid up to the reserve price (*f*). And the opinion has been judicially expressed that the Act limits a vendor, who has reserved the right to bid, to the employment of one person only to bid on his behalf (*g*). The terms of a condition reserving the right to bid must of course be strictly observed; as if the vendor reserve the right of bidding *once*, a second bidding on his behalf will invalidate the sale (*h*). In consequence of this law, when land is to be sold by auction, the conditions of sale usually provide that the vendor reserves the right to bid as often as he may please; and if the sale be stated to be subject to a reserved price, the right of bidding generally is reserved to the vendor as well (*i*).

(*d*) Stat. 30 & 31 Vict. c. 48, s. 5.

(*e*) Sect. 6.

(*f*) *Gilliat* v. *Gilliat*, L. R. 9 Eq. 60.

(*g*) Grove and Lindley, JJ., *Parfitt* v. *Jepson*, 46 L.J.N.S.C.P. 529, 532, 533.

(*h*) *Parfitt* v. *Jepson*, ubi sup.

(*i*) 1 Davidson, Prec. Conv. 607, 4th ed., 518, 5th ed.; Key & Elphinstone, Prec. Conv. 257, 258 and n. (*a*), 4th ed.

Payment of a deposit.

A matter to be considered before the formation of a contract is the payment of a deposit. For no deposit of any part of the purchase-money can be lawfully demanded after an open contract for sale has been concluded; as the whole price is not payable until the time for completion, which in the case of an open contract is the time when the vendor shall have shown a good title (*j*). On sales by auction a stipulation is invariably made that a deposit of a certain proportion (generally ten per cent.) of the purchase-money shall be paid by the purchaser immediately on entering into the contract. On London sales, it is usually provided that the deposit shall be paid into the hands of the auctioneers; on country sales, the vendor's solicitors are generally appointed to receive it (*k*). The deposit is taken not only in part payment of the purchase-money, but also as a guarantee for the due performance of the contract; and it is liable to be forfeited by the purchaser if he fail to carry out the agreement. This is the case, whether the stipulation for payment of the deposit expressly so provide, or not (*l*). When the deposit is paid to an auctioneer, he receives it as stakeholder, being liable to pay it to the vendor, should the contract be completed or the purchaser break the contract, but to the purchaser, should the contract be broken by the vendor (*m*). The auctioneer is responsible for the sum deposited with him; and as he receives the deposit in this character and with this responsibility, and not as agent for either party, he is entitled to retain for his own benefit any interest he may make by the use of the money, whilst it remains in his hands. Until the purchase is completed, the auctioneer ought not to part with the

(*j*) *Binks* v. *Rokeby*, 2 Swans. 222; *Doe* d. *Gray* v. *Stanion*, 1 M. & W. 695, 701; 2 Dart, V. & P. 711.

(*k*) 1 Davidson, Prec. Conv. 519 and n. (*e*), 5th ed.; 1 Key & Elphinstone, Prec. Conv. 258 and n. (*b*), 4th ed.

(*l*) *Howe* v. *Smith*, 27 Ch. D. 89.

(*m*) *Harington* v. *Hoggart*, 1 B. & Ad. 577.

deposit without the consent of the purchaser as well as of the vendor (*n*). Where the deposit is paid to the vendor's solicitor, it is generally received by him as agent for the vendor. In that case he cannot put it out at interest without accounting therefor to the vendor; and if the vendor demand payment of the deposit to himself, the solicitor will be bound to hand it over to him (*o*). If however the vendor's solicitor receive the deposit in the character of stakeholder, and not as the vendor's agent, he will be subject to the same responsibilities and enjoy the same advantages as any other stakeholder (*p*).

Payment of deposit on sales by private contract.

Sometimes provision is made for payment of a deposit on sales by private contract. The insertion of such a condition is of great advantage to the vendor, owing to the rule that the deposit is a guarantee for the purchaser's performance of his agreement (*q*). To the purchaser, however, the payment of a deposit is correspondingly prejudicial; as it leaves him exposed to the danger of losing his deposit in a case where the Court, while refusing to enforce specific performance against him, will yet hold him to his bargain at law (*r*). A purchaser by private treaty should therefore take care not to bind himself by a stipulation for payment of a deposit, if he can possibly avoid doing so. And if the vendor refuse to sell except on condition of the payment of a deposit, the purchaser should on no account agree to the payment of the deposit to the vendor, or to the vendor's solicitor as his agent, but should insist on placing the deposit in the hands of a stakeholder. If the vendor's solicitors be of good repute, they may usually be accepted as holders of the deposit, the con-

(*n*) 1 Dart, V. & P. 205.
(*o*) *Edgell* v. *Day*, L. R. 1 C. P. 80.
(*p*) *Wiggins* v. *Lord*, 4 Beav. 30.
(*q*) Ante, p. 22.
(*r*) *Scott* v. *Alvarez*, 1895, 2 Ch. 603.

tract expressly providing that the same is to be paid to them *as stakeholders*. For if a purchaser submit to pay a deposit to the vendor's solicitors as the vendor's agents, he may find that the vendor can make no title to the property sold and is insolvent; and in such a case the purchaser will have no right to sue the solicitors for the recovery of his deposit (*s*).

Stamp on contract for sale of lands.

All contracts for the sale of land, whether made by formal memorandum or by letter (*t*), must be duly stamped; otherwise they cannot be given in evidence, except in criminal proceedings, and are not available for any purpose whatever. But they may be stamped after execution, and so received in evidence on payment of the proper duty and the appointed penalty (*u*).

(*s*) *Ellis* v. *Goulton*, 1893, 1 Q. B. 350.

(*t*) See *Gwythor* v. *Gordon*, 3 Times L. R. 461; *Carlill* v. *Carbolic Smoke Ball Co.*, 1892, 2 Q. B. 484, 489, 490, affirmed 1893, 1 Q. B. 256.

(*u*) Stat. 54 & 55 Vict. c. 39 (Stamp Act, 1891), ss. 14, 15, replacing 33 & 34 Vict. c. 97, ss. 15—17, and 17 & 18 Vict. c. 125, ss. 28, 29. Under the Stamp Act, 1891, agreements under hand only are, as a rule, chargeable with the duty of sixpence, which may be denoted by an adhesive stamp to be cancelled by the person by whom the agreement is first executed; and agreements under seal are chargeable, as deeds, with the duty of ten shillings; sect. 22 & 1st schedule. But by sect. 59:—

(1) Any contract or agreement made in England or Ireland under seal, or under hand only, or made in Scotland, with or without any clause of registration, *for the sale of any equitable estate or interest in any property whatsoever*, or for the sale of any estate or interest in any property *except lands, tenements, hereditaments, or heritages*, or property locally situate out of the United Kingdom, or goods, wares or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold.

(2) Where the purchaser has paid the said *ad valorem* duty and before having obtained a conveyance or transfer of the property enters into a contract or agreement for the sale of the same, the contract or agreement shall be charged, if the consideration for that sale is in excess of the consideration for the original sale, with the *ad valorem* duty payable in respect of such excess consideration, and in any other case with the fixed duty of ten shillings or of sixpence, as the case may require.

(3) Where duty has been duly paid in conformity with the foregoing provisions, the conveyance or transfer made to the purchaser or sub-purchaser, or any other person on his behalf or by his direction,

shall not be chargeable with any duty, and the Commissioners, upon application, either shall denote the payment of the *ad valorem* duty upon the conveyance or transfer, or shall transfer the *ad valorem* duty thereto upon production of the contract or agreement, or contracts or agreements, duly stamped.

(4) Provided that where any such contract or agreement is stamped with the fixed duty of ten shillings or of sixpence, as the case may require, the contract or agreement shall be regarded as duly stamped for the mere purpose of proceedings to enforce specific performance or recover damages for the breach thereof.

(5) Provided also that where any such contract or agreement is stamped with the said fixed duty, and a conveyance or transfer made in conformity with the contract or agreement is presented to the Commissioners for stamping with the *ad valorem* duty chargeable thereon within the period of six months after the first execution of the contract or agreement, or within such longer period as the Commissioners may think reasonable in the circumstances of the case, the conveyance or transfer shall be stamped accordingly, and the same, and the said contract or agreement, shall be deemed to be duly stamped. Nothing in this provision shall alter or affect the provisions as to the stamping of a conveyance or transfer after the execution thereof.

(6) Provided also, that the *ad valorem* duty paid upon any such contract or agreement shall be returned by the Commissioners in case the contract or agreement be afterwards rescinded or annulled, or for any other reason be not substantially performed or carried into effect, so as to operate as or be followed by a conveyance or transfer.

The provisions of sub-section 1 of the above enactment have been considered in *Smelting Co. of Australia, Ld.* v. *Commrs. of Inland Revenue*, 1897, 1 Q. B. 175; *West London Syndicate, Ld.* v. *Commrs. of Inland Revenue*, 1898, 2 Q. B. 507; *Farmer & Co. Ld.* v. *Commrs. of Inland Revenue*, 1898, 2 Q. B. 141 (contract made in England for sale of equity of redemption of lands in New South Wales held chargeable with *ad valorem* duty); *Chesterfield Brewery Co.* v. *Inland Revenue Commrs.*, 1899, 2 Q. B. 7; *Danubian Sugar Factories, Ld.* v. *Inland Revenue Commrs.*, 1901, 1 Q. B. 245; *Inland Revenue Commrs.* v. *Muller, &c. Ld.*, 1901, A. C. 217.

The practical result appears to be that contracts for sale of any legal estate or interest in any lands, tenements or hereditaments are only chargeable with the stamp duty of sixpence or ten shillings according as they are under hand or seal. While contracts for sale of any equitable estate or interest in any property whatsoever, including lands wherever situate, are chargeable with *ad valorem* duty, but may be stamped with the fixed duty of sixpence or ten shillings, if a further conveyance of the estate or interest sold be contemplated. To leave the last-mentioned contracts unstamped would appear to involve the risk of having to pay double the *ad valorem* duty on stamping after execution; see sect. 15 of the Stamp Act, 1891.

CHAPTER II.

OF THE PARTIES' RIGHTS, OBLIGATIONS AND REMEDIES, GENERALLY.

Conveyancers' duties on sales.

HAVING considered the formation of a contract for the sale of land, let us pass on to examine its terms. As we have seen (*a*), such contracts generally contain special stipulations varying the rights and obligations of the parties as defined by law. And a conveyancer's business in connection with sales of land includes drawing up the conditions of a sale by auction, a task in which he is engaged exclusively in the vendor's interest; arranging the terms of a private contract, when he may be acting for either party, making requisitions on title for the purchaser or answering them on the vendor's behalf, and settling the conveyance on either side. It is obvious that these duties cannot be efficiently discharged without an accurate knowledge of the position of the parties to any open contract, and a clear understanding of the conditions generally made in more formal agreements. Our object therefore will be to ascertain the rights and obligations implied by law on a contract to sell land, when the parties, the property and the price are the only terms defined; and to consider at the same time the stipulations by which the contractors' legal relations are commonly modified. And our design is first to take a general view of the contract and the remedies for enforcing it, and then to

(*a*) Ante, p. 15.

examine more fully each incident of the sale in turn, as far as possible, in order of time according as each part of the contract has to be performed.

Outline of the effect of the contract.

When two persons have entered into the relation of vendor and purchaser by duly signing a contract for the sale of land, their chief duties are these:—The vendor is bound to show a good title to the property sold (*b*), and for that purpose to deliver at his own expense to the purchaser a proper abstract of title to the property, showing the dealings therewith and devolution thereof during the period for which title is by law or express

(*b*) *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Souter* v. *Drake*, 5 B. & Ad. 992; *Doe* d. *Gray* v. *Stanion*, 1 M. & W. 695, 701; *Lysaght* v. *Edwards*, 2 Ch. D. 499, 507; *Ellis* v. *Rogers*, 29 Ch. D. 661, 670, 672. In the last-mentioned case, Cotton, L. J., suggested a question whether the right to a good title is an implied term in the contract or a collateral right given by the law. It is submitted, however, that the obligation to show a good title on a sale of land is not an undertaking collateral to in the sense of independent of the main contract. Cotton, L. J., quoted the authority of Lord St. Leonards (Sug. V. & P. 16) and Parke, B. (*Doe* d. *Gray* v. *Stanion*, ubi sup.), for the view that this obligation is an implied term of the contract. The opposite view he rested upon a *dictum* of Grant, M. R., in *Ogilvie* v. *Foljambe*, 3 Mer. 53, 64. On examining this *dictum*, however, it appears that Grant, M. R., meant to say nothing more than that in the particular case before him the purchaser's right to have a good title was not provided for by the written agreement between the parties. It is true that he spoke of the *controversy* between the parties, as to what title the purchaser could require, as being collateral to the agreement, because no term in the written agreement was sought to be varied or added to; and said that the right to a good title was a right not growing out of the agreement between the parties but given by law. But this surely means no more than that, in the particular case before him, the extent of the purchaser's right to require a good title was a matter depending, not on the express, but on the implied terms of the contract. As the failure to show a good title, on the sale of land, is such a breach of contract as discharges the purchaser from the necessity of performing his part of the agreement, it seems clear that the obligation to show a good title is an integral part of the agreement; see *Duke of St. Albans* v. *Shore*, 1 H. Bl. 270, 278; *Seaward* v. *Willock*, 5 East, 198, 202; *Souter* v. *Drake*, *Ellis* v. *Rogers*, ubi sup. This would not be the case, if the obligation to prove title were strictly collateral to the contract of sale. Breach by the vendor of a *strictly collateral* warranty upon a sale does not discharge the purchaser from the main contract, as in the case of a warranty of quality on the sale of specific goods, where the buyer has had the opportunity of inspecting them; *Street* v. *Blay*, 2 B. & Ad. 456; *Heyworth* v. *Hutchinson*, L. R. 2 Q. B. 447; Benjamin on Sale, 448, 741, 748, 749, 2nd ed.; Pollock on Contract, 437, 5th ed., 466, 6th ed.

agreement required to be shown (*c*). In the absence of special stipulation this period is, as a rule, forty years (*d*). The vendor is also bound to verify the abstract by producing proper evidence of all the deeds, wills and other documents appearing on the abstract and of all material facts stated therein, such as births, deaths, marriages or bankruptcies (*e*); and he is bound to prove the identity of the property sold with that to which the documents of title relate (*f*). But the purchaser, in the absence of stipulation to the contrary, must now bear the expense of producing all documents of title, which are not in the vendor's possession (*g*), and of procuring all other evidence of title which the vendor has not in his possession (*h*). The purchaser also bears all expense of the examination of the title deeds by his solicitor (*i*). If the title shown be accepted, the vendor is bound to convey the property to the purchaser free from all incumbrances: unless of course the purchaser should have agreed to take the property subject to any specified incumbrances (*j*). The vendor is therefore bound, on payment of the purchase-money, to execute a proper deed of conveyance to the purchaser of the estate sold. But the purchaser must bear the expense of preparing this conveyance; although, in the absence of special stipulation, the expense of the concurrence therein of all necessary parties other than the vendor (such as mortgagees or incumbrancers) and of the execution thereof by the vendor will fall on the

(*c*) Sug. V. & P. 406; *Re Johnson and Tustin*, 30 Ch. D. 42.

(*d*) Stat. 37 & 38 Vict. c. 78, s. 1.

(*e*) Sug. V. & P. 406, 414 et seq., 447—450; 1 Dart, V. & P. 159, 160, 350 et seq., 470; 1 Davidson, Prec. Conv. 457, 5th ed.

(*f*) *Flower* v. *Hartopp*, 6 Beav. 476; *Curling* v. *Austin*, 2 Dr. & Sm. 129; 1 Davidson, Prec. Conv. 557, 4th ed., 463, 5th ed.

(*g*) See *Re Willett and Argenti*, 5 Times L. R. 476; *Re Stuart & Olivant and Seadon's Contract*, 1896, 2 Ch. 328.

(*h*) Stat. 44 and 45 Vict. c. 41, s. 3, sub-s. 6, reversing the previous rule.

(*i*) Sug. V. & P. 406, 429, 430; Wms. Conv. Stat. 47—50.

(*j*) Wms. Real Prop. 555, 18th ed.

vendor (*k*). The vendor is also bound to hand over to the purchaser on completion all deeds and other muniments of title relating solely to the property purchased (*l*); and must, as a rule, furnish the purchaser, at the purchaser's expense (*m*), with a proper statutory acknowledgment of right to production and undertaking for safe custody of all such documents, necessary to make a good title, as may be withheld from the purchaser, either because they relate to other property retained by the vendor or because their custody rightly belongs to some other person than the vendor (*n*). The chief duties of the purchaser under a contract for sale of land are to examine the evidence of title offered by the vendor, and if and when a good title is shown, to accept the title, to prepare a conveyance of the property and tender the same to the vendor for his execution and thereupon to pay the price (*o*).

Proof of title.

The most prominent term of the contract is that which requires the vendor to show a good title. This obligation is the cause of most of the disputes and litigation between buyers and sellers of land. As is well known, the procedure usually adopted to secure the fulfilment of the vendor's duties is for the purchaser's advisers, after they have perused the abstract of title, to send in written requisitions dealing with the points in which they consider the title to be deficient or insufficiently proved or the vendor's obligations to be otherwise imperfectly dis-

Requisitions and answers.

(*k*) Sug. V. &. P. 561, see 557-8; 1 Dart, V. & P. 798, 814; 1 Davidson, Prec. Conv. 570-2, 612, 4th ed., 477-9, 5th ed.

(*l*) Sug. V. & P. 407, 433; *Re Duthy and Jesson's Contract*, 1898, 1 Ch. 419.

(*m*) Stat. 37 & 38 Vict. c. 78, s. 2 (rule 4).

(*n*) *Cooper* v. *Emery*, 1 Ph. 388; Sug. V. & P. 446—450, 453; stat. 44 & 45 Vict. c. 41, s. 9; the vendor must also furnish the purchaser with attested copies of such last-mentioned muniments of title, if the purchaser require them, but at the purchaser's expense; stat. 44 & 45 Vict. c. 41, s. 3 (6).

(*o*) *Baxter* v. *Lewis*, Forrest, 61; *Martin* v. *Smith*, 6 East, 555; *Poole* v. *Hill*, 6 M. & W. 835; Sug. V. & P. 240, 241.

charged. To these requisitions the vendor returns written answers confessing or repudiating his liability to comply with them, as the case may be. Unless he accede to every requisition, his answers will evoke replies from the other side; and these again will demand further response. So the contest continues until all grounds of difference are removed, the title is accepted, and the parties proceed to completion, or the questions on which neither party will give way are submitted to the determination of the Court. In advising as to the conduct of these negotiations, it is of course of the highest importance to know when to insist and when to yield. On each point the conveyancer's attitude will be determined by the countenance he may expect his contention to receive from the Court, in case he should fail to convince his opponent; and at every step he must consider the alternative of submission or litigation. It is thought therefore that, before entering into a detailed examination of the terms of the contract, it will be well to take a brief survey of the remedies provided to secure its performance and of the principles on which the Court will administer relief against its breach.

Remedies for breach of the contract: — 1. Action for damages.

Either vendor or purchaser may pursue the ordinary common law remedy for breach of contract, that is, to sue the other for damages. If the vendor have conveyed the land to the purchaser without receiving payment, he can of course recover the whole price at law. But if he sue at law for breach of contract, without having parted with his legal estate in the land, he cannot recover the full price as damages, but is limited to the amount of the loss he has actually sustained (*p*). A purchaser suing at law for breach of the contract can, as a rule, recover no damages for loss of his bargain, but only his expenses of investigating title,

(*p*) *Laird* v. *Pim*, 7 M. & W. 474.

&c. and the amount of his deposit, if any (*q*). This exception to the common law rule regarding damages for breach of contract seems to have been allowed in consideration of the difficulties attending the fulfilment of the vendor's obligation to show a good title. But the most effective remedy of either party is to obtain the specific performance of the contract under the equitable jurisdiction of the Court. The administration of this relief, though in unobjectionable cases it is granted as much of course as damages are given at law (*r*), is nevertheless held to be in the discretion of the Court—a discretion however which is not arbitrary or capricious, but judicial, to be exercised according to fixed rules and principles (*s*). To obtain a decree of specific performance is not a matter depending merely on proof of the contract and refusal to perform it, but the Court will have regard to circumstances outside the contract, and especially to the conduct of the parties, and, considering these, will determine whether it is equitable (that is, in accordance with the principles by which Courts of Equity are guided) to grant the desired relief or not (*t*). Thus it is that in deciding whether the specific performance of a contract should be enforced, the Court enters into considerations, which it would not examine in adjudging what relief either party should have for a breach of the same contract at law. For example, a vendor of land will not be entitled to enforce specific performance of the contract unless his conduct has conformed to the standard of fair dealing, which the Courts of Equity have set; although he may be allowed at the same time to stand upon his contractual rights at com-

2. Action for specific performance.

(*q*) *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Bain* v. *Fothergill*, L. R. 7 H. L. 158.

(*r*) Grant, M. R., *Hall* v. *Warren*, 9 Ves. 605, 608.

(*s*) Eldon, C., *White* v. *Damon*, 7 Ves. 30, 35; Romilly, M. R., *Haywood* v. *Cope*, 25 Beav. 140, 151; Lord Chelmsford, *Lamare* v. *Dixon*, L. R. 6 H. L. 414, 423.

(*t*) *Clowes* v. *Higginson*, 1 V. & B. 524, 527; *Lamare* v. *Dixon*, L. R. 6 H. L. 414, 423, 428.

mon law, and to exact his full measure of compensation thereunder. If therefore special stipulations restrictive of the purchaser's rights be inserted in the contract in a manner which a Court of Equity regards as unfair, the Court will not grant specific performance of the contract at the instance of the vendor (*u*); notwithstanding that the vendor may be able to insist on those same stipulations in any proceedings in which the relief administered is determined solely by the rules of law (*x*). Besides an action for damages at law or specific performance in equity, there is another proceeding in which questions arising between vendors and purchasers of land may be decided. This is a summons under section 9 of the Vendor and Purchaser Act, 1874 (*y*). In such a summons the rights of the parties may be measured by the rules of equity or law, according to the relief claimed. Questions, of which the solution must result in binding either party to complete the purchase (as where it is claimed that the vendor has shown such a title as the purchaser is bound to accept) are determined according to the rules of equity applied in actions for specific performance. But if the purchaser claims not only to be relieved from performing the contract, but also to have his deposit (if any) returned to him, and his expenses of investigating the title paid, he is virtually pursuing the remedy accorded for breach of the contract in a Court of law (*z*); and his title to relief will be governed strictly by the rules of law, without reference to the considerations which would guide the Court in granting or withholding specific performance (*a*).

3. Vendor and purchaser summons.

(*u*) *Re Marsh and Earl Granville*, 24 Ch. D. 11.

(*x*) *Re Davis and Cavey*, 40 Ch. D. 601, 607; *Re National Provincial Bank of England and Marsh*, 1895, 1 Ch. 190; *Scott* v. *Alvarez*, 1895, 2 Ch. 603.

(*y*) Stat. 37 & 38 Vict. c. 78.

(*z*) Ante, p. 30; *Re Hargreaves and Thompson's Contract*, 32 Ch. D. 454.

(*a*) See the cases cited in note (*x*), above.

To give a clearer view of the terms implied by law in an open contract of sale, the writer has endeavoured to express them in a manner similar to that in which special conditions of sale are usually drawn. This will facilitate the comparison of the terms of an open contract with those of a formal agreement containing the usual conditions. It will be remembered that the Statute of Frauds requires a written and signed memorandum describing (at least) the parties, the property sold and the price (*b*). This may take the following form :—

Formal memorandum of an open contract.

MEMORANDUM OF AN AGREEMENT made this first day of May, 1898, between A. B., of &c. [*Insert description*] and C. D., of &c. [*Insert description*] whereby the said A. B. agrees to sell and the said C. D. to buy at the price of 4,000*l.*, the freehold in fee simple free from incumbrances of ALL THAT &c. [*Insert description of the property*]. In witness whereof the said parties have hereunto set their hands the day and year above named.

(Signed) A. B.
C. D.

Contract formed by letters.

Open contracts, however, are very rarely made by the signature of a formal memorandum. They usually result from the acceptance of a written offer, as thus :—

THE WHITE HOUSE,
GREENFIELD, SUSSEX.
1 *June*, 1898.

DEAR SIR,

I would take 4,500*l.* for this house with the garden and two fields adjoining.

Yours faithfully,
A. B.

C. D., Esq.

(*b*) Above, pp. 4, 15.

10, Blank Street, W.
2 *June*, 1898.

Dear Sir,

I accept the offer made in your letter of yesterday.

Yours faithfully,
C. D.

A. B., Esq. (*c*).

The unincumbered fee simple contracted for, unless the contrary appear.

In such cases it is understood that the interest sold is the freehold in fee simple free from incumbrances, unless it appear from the memorandum that some lesser interest is the subject of the contract, or that the purchaser is to take the property subject to certain incumbrances (*d*). Whether the memorandum of an open contract be formal or informal, the agreement comprises the following terms :—

Terms of an open contract.

Vendor to show a good title.

1.—(1.) The vendor shall show a good title to the property sold.

(2.) In order to discharge this obligation, he shall deliver at his own expense to the purchaser a proper abstract of title to the property, showing the dealings therewith and devolution thereof for the forty years next before the contract, and shall verify the abstract by producing proper evidence of all the deeds, wills and other documents appearing on the abstract and of all material facts stated therein, and shall prove the identity of the property sold with that to which the muniments of title relate (*e*).

Necessity of a good root of title.

(3.) The vendor shall prove forty years' seisin in fee of the property sold. If therefore an instrument of disposition be offered in unsupported proof of the commencement of the vendor's title, it must be a good

(*c*) See above, pp. 7, 16.

(*d*) *Hughes* v. *Parker*, 8 M. & W. 244; *Bower* v. *Cooper*, 2 Hare, 408; Sug. V. & P. 298; *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159.

(*e*) Above, pp. 27, 28.

root of title; that is to say, it must deal with or prove on the face of it, without the aid of extrinsic evidence, the ownership of the whole legal and equitable estate in the property sold, contain a description by which the property can be identified, and show nothing to cast any doubt on the title of the disposing parties. Otherwise, any deficiency in any of the above respects must be made good by further evidence (*f*).

(4.) Proper evidence of title means such evidence as a court of equity will force a purchaser to accept on a sale, whether admissible in litigation or not (*g*).

(5.) Recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts of Parliament or statutory declarations twenty years old at the date of the contract shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions (*h*).

(6.) The purchaser shall not require the production, or any abstract or copy, of any deed, will, or other document dated or made before the time prescribed by law or stipulated for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals contained in the abstracted instruments of any deed, will, or other document forming part of that prior title are correct and give all the material contents of the

(*f*) *Parr* v. *Lovegrove*, 4 Drew. 170; 1 Dart, V. & P. 337.

(*g*) See below, Chap. IV., sect. 3.

(*h*) Stat. 37 & 38 Vict. c. 78, s. 2 (rule 2).

deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment, or otherwise (*i*).

Vendor must produce a property identical with that described in the contract.

2.—(1.) The vendor shall also prove that the property offered by him in fulfilment of the contract for sale is substantially identical, as respects tenure, incidents of tenure, estate, situation, quantity and otherwise, with the property described in the contract.

(2.) If the property offered by the vendor in fulfilment of the contract for sale shall not be substantially identical with the property described in the contract, the vendor shall not enforce the contract at law or in equity, and the purchaser may treat the contract as broken (*k*): but if in such case there be a mere deficiency (whether of estate, area or otherwise) capable of assessment at a money value, the purchaser may in equity exact the specific performance of the contract with compensation for the deficiency, provided this will not prejudice third parties (*l*), or involve great hardship on the vendor (*m*).

(3.) If an insubstantial error shall be found in the description of the property contained in the contract for sale, the vendor shall not enforce the contract at law, but may in equity exact the specific performance thereof, on giving compensation for the error (*n*).

Verification

3.—(1.) The vendor shall produce all the evidence of

(*i*) Stat. 44 & 45 Vict. c. 41, s. 3 (3).

(*k*) *Flight* v. *Booth*, 1 Bing. N. C. 370; *Pulsford* v. *Richards*, 17 Beav. 87, 95, 96; *Swaisland* v. *Dearsley*, 29 Beav. 430; *Torrance* v. *Bolton*, L. R. 8 Ch. 118; *Re Arnold*, 14 Ch. D. 270; *Re Beyfus and Masters' Contract*, 39 Ch. D. 110; *Re Fawcett and Holmes' Contract*, 42 Ch. D. 150; *Jacobs* v. *Revell*, 1900, 2 Ch. 858; Dart, V. & P. 151, 152, 1199—1205; Fry, Sp. Perfce. §§ 1209, 1217—1238.

(*l*) *Thomas* v. *Dering*, 1 Keen, 729, 6 L. J. N. S. Ch. 267; *Willmott* v. *Barber*, 15 Ch. D. 96.

(*m*) *Mortlock* v. *Buller*, 10 Ves. 292, 315; *Castle* v. *Wilkinson*, L. R. 5 Ch. 534, 536; *Hooper* v. *Smart*, L. R. 18 Eq. 683, *Horrocks* v. *Rigby*, 9 Ch. D. 180; Fry, Sp. Perfce. §§ 1209, 1210, 1257 *sq.*; *Rudd* v. *Lascelles*, 1900, 1 Ch. 815.

(*n*) *Calcraft* v. *Roebuck*, 1 Ves. jun. 221; Fry, Sp. Perfce. §§ 1213, 1229—1238.

title, which is in his own possession, at the proper place for verification of the abstract, that is to say, at his own residence, upon or near the property sold or in London; or he shall pay the extra expense occasioned to the purchaser by the examination of any such evidence elsewhere: but he may produce any documents of title, which are in the possession of other persons than himself, at the place where such documents are, and the purchaser shall pay any extra expense so caused of the examination of such documents by him or his solicitor (*o*). of the abstract.

(2.) The purchaser shall pay the expense of procuring and producing all evidence of title which he may require, but which is not in the vendor's possession (*p*).

(3.) The vendor shall at his own expense procure all documents of title, which are required by law to be stamped but are unstamped or insufficiently stamped, to be properly stamped (*q*).

4. The purchaser shall at his own expense examine the abstract of title and the evidence offered in support of it; and if and so soon as a good title shall be shown, he shall accept the title (*r*). Purchaser to accept the title, if shown to be good.

5.—(1.) The purchase shall be completed so soon as the vendor shall have shown a good title, that is to say, when the title contracted for shall have been proved upon the abstract and by all the evidence necessary to verify the same (*s*). The purchaser shall thereupon prepare at his own expense a proper conveyance of the property to the purchaser or as he shall direct (*t*), and Completion of the purchase.

(*o*) *Sharp* v. *Page*, Sug. V. & P. 430; *Hughes* v. *Wynne*, 8 Sim. 85; Sug. V. & P. 429, 430; 1 Dart, V. & P. 470, 471; stat. 44 & 45 Vict. c. 41, s. 3 (6).

(*p*) This is the effect of stat. 44 & 45 Vict. c. 41, s. 3 (6); see *Re Willett and Argenti*, 5 Times L. R. 476; *Re Stuart, Olivant and Seadon's Contract*, 1896, 2 Ch. 328.

(*q*) *Whiting* to *Loomes*, 14 Ch. D. 822, 17 Ch. D. 10.

(*r*) Above, p. 29.

(*s*) Above, p. 22.

(*t*) *Egmont* v. *Smith*, 6 Ch. D. 469, 474.

shall tender the same to the vendor for execution, at the same time tendering the whole amount due in payment of the purchase-money (*u*); and the vendor shall thereupon accept such payment and execute the conveyance at his own expense and shall give possession of the property to the purchaser (*v*).

(2.) A proper conveyance of the property means an assurance effectual to vest the whole estate contracted for, both legal and equitable, in the purchaser or his nominee, and containing the usual covenants for title by the vendor. These are covenants for right to convey, quiet enjoyment, freedom from incumbrances and further assurance, extending to indemnity against anything done, omitted or knowingly suffered by the vendor and his predecessors in title back to and including the last person who became entitled to the property on a sale or another occasion on which proper covenants for title were given (*w*).

(3.) If the state of the vendor's title be such that, in order to convey to the purchaser the whole estate contracted for, other parties than the vendor must join in the conveyance, the vendor shall at his own expense procure all such other necessary parties to join in and execute the conveyance (*x*).

Vendor to deliver over the muniments of title on completion.

6.—(1.) The vendor shall deliver to the purchaser on completion all muniments of title relating solely to the property purchased (*y*), but he shall retain any documents of title which are in his own possession and relate to any part of an estate retained by him as well as to the property sold (*z*); and he shall not be required

(*u*) Above, p. 29.

(*v*) *Royal Bristol Permanent Building Society* v. *Bomash*, 35 Ch. D. 390.

(*w*) *Church* v. *Brown*, 15 Ves. 263; Williams, Real Prop. 447—449, 13th ed.; 568—571, 18th ed.; Williams, Conv. Stat. 74—86.

(*x*) *Esdaile* v. *Oxenham*, 3 B. & C. 225, 228, 229; Sug. V. & P. 557, 558, 561; 2 Dart, V. & P. 798, 814; 1 Davidson, Prec. Conv. 572, 612, 4th ed.

(*y*) Above, p. 29.

(*z*) Stat. 37 & 38 Vict. c. 78, s. 2 (rule 5); see *Re Williams and*

to obtain and hand over to the purchaser any documents of title, which relate to other property as well as to the property sold, and of which any person other than the vendor is entitled to retain possession (*a*).

Or give proper statutory acknowledgments and undertakings as to any documents of title rightfully retained.

(2.) The vendor shall give or procure to be given to the purchaser proper statutory acknowledgments of right to production and delivery of copies, and proper statutory undertakings for safe custody, and also (if required by the purchaser, but at his expense) attested copies of all such documents of title as are not handed over to the purchaser on completion and are necessary to make a good title according to the contract; except documents in public or official custody and other documents, not being in the vendor's possession or power, of which the purchaser can always obtain good evidence himself: but the purchaser shall not require any fresh acknowledgment, undertaking or covenant to be given to him as regards any document lawfully retained by some other person than the vendor, for the production and safe custody whereof the purchaser will on completion have the right to enforce at law a proper statutory acknowledgment and undertaking or a covenant given to the vendor or his predecessor in title (*b*).

(3.) A proper statutory acknowledgment or undertaking can only be given by the person who retains possession of the documents (*c*).

(4.) Such statutory acknowledgments and undertakings as the purchaser can and shall require shall be furnished at his expense; but the vendor shall bear the expense of the perusal and execution thereof on behalf and by himself and all necessary parties other than the vendor (*d*).

(5.) The inability of the vendor to furnish the pur-

Duchess of Newcastle's Contract, 1897, 2 Ch. 144.

(*a*) Sug. V. & P. 446–450, 453; 1 Dart, V. & P. 626.

(*b*) *Cooper* v. *Emery*, 1 Ph. 388; Sug. V. & P. 446—450, 453, and n.; stat. 44 & 45 Vict. c. 41, ss. 6 (3), 9 (8, 11).

(*c*) See stat. 44 & 45 Vict. c. 41, s. 9 (1, 9).

(*d*) Stat. 37 & 38 Vict. c. 78, s. 2 (rule 4), as modified by stat. 44 & 45 Vict. c. 41, s. 9 (8, 11).

chaser with proper statutory acknowledgments and undertakings with regard to any documents of title shall not be an objection to title in case the purchaser will on completion of the contract have an equitable right to the production of such documents (*f*).

Time for carrying out the contract.

7.—(1.) Any act necessary to be done by either party in order to carry out the contract, such as the delivery of the abstract, the statement of the objections to or the acceptance of the title, or the preparation of the conveyance, ought to be done within a reasonable time (*g*).

(2.) In the case of unreasonable delay by either party in the performance of any act necessary to carry out the contract, the other party may serve a notice on the party in default requiring him to do the act, which he delays to perform, within some time (which must be a reasonable space of time as from the date of the notice) specified in the notice, and intimating the other party's intention to put an end to the contract, if the notice be not complied with; and if such a notice be served and be not complied with, the party in default shall not enforce the specific performance of the contract in equity (*h*), and shall be liable at law for a breach of the contract (*i*).

Rights of property and possession pending completion.

8.—(1.) As from the date of the contract for sale the property shall in equity belong to the purchaser, with this exception, that the vendor shall until the proper

(*f*) Stat. 37 & 38 Vict. c. 78, s. 2 (rule 3), as modified by stat. 44 & 45 Vict. c. 41, s. 9 (8, 11).

(*g*) Romilly, M.R., *Baker* v. *Metropolitan Ry. Co.*, 31 Beav. 504, 509, 510; Fry, J., *Green* v. *Sevin*, 13 Ch. D. 589, 599; Romer, J., *Compton* v. *Bagley*, 1892, 1 Ch. 313, 321.

(*h*) *Spurrier* v. *Hancock*, 4 Ves. 667; Langdale, M.R., *Taylor* v. *Brown*, 2 Beav. 180, 183; Romilly, M.R., *Parkin* v. *Thorold*, 16 Beav. 59, 71; *Pegg* v. *Wisden*, 16 Beav. 239, 244; Fry, J., *Crawford* v. *Toogood*, 13 Ch. D. 153, 158; *Green* v. *Sevin*, 13 Ch. D. 589, 599–601.

(*i*) *Compton* v. *Bagley*, 1892, 1 Ch. 313.

time for completion take the rents, crops and other ordinary profits for his own use: but with this exception the vendor shall in equity have no other beneficial interest in the property than a lien for the price (*j*).

(2.) The vendor shall be entitled to an apportioned part of all rents accrued due at but not payable until after the proper time for completion (*k*).

(3.) Pending the completion of the purchase the vendor shall retain possession of the property sold, and shall manage and preserve it with the same care as a trustee is bound to use with regard to the property subject to his trust (*l*).

(4.) The vendor shall pay all rates, taxes and other outgoings payable in respect of or charged upon the property sold up to the proper time for completion.

(5.) Of such outgoings as are apportionable by law he shall only pay a due proportion up to the proper time for completion: but he shall discharge all outgoings not apportionable and becoming charged on the premises before such time, notwithstanding that they may not be payable until after such time (*m*).

Interest payable if completion be delayed.

9.—(1.) If the purchase shall not be completed at the proper time, the purchaser shall pay interest at the rate of 4*l.* per cent. per annum (*n*) on the price agreed upon from that time until the completion of the purchase, and shall be entitled as from that time to the rents and

(*j*) *Paine* v. *Meller*, 6 Ves. 349, 352; Plumer, M. R., *Wall* v. *Bright*, 1 J. & W. 494, 500; Cairns, C., *Shaw* v. *Foster*, L. R. 5 H. L. 321, 338; Jessel, M. R., *Lysaght* v. *Edwards*, 2 Ch. D. 499, 505-8; Dart, V. & P. 285, 733.

(*k*) Stat. 33 & 34 Vict. c. 35, s. 2.

(*l*) *Phillips* v. *Silvester*, L. R. 8 Ch. 173; *Egmont* v. *Smith*, 6 Ch. D. 469; *Royal Bristol, &c. Bdg. Soc.* v. *Bomash*, 35 Ch. D. 390; *Clarke* v. *Ramuz*, 1891, 2 Q. B. 456; see 2 Dart, V. & P. 733-5.

(*m*) *Carrodus* v. *Sharp*, 20 Beav. 56; *Midgley* v. *Coppock*, 4 Ex. D. 309; *Re Betteswortb and Richer*, 37 Ch. D. 535; *Tubbs* v. *Wynne*, 1897, 1 Q. B. 74; *Barsht* v. *Tagg*, 1900, 1 Ch. 231; *Stock* v. *Meakin*, ib. 683; see *Egg* v. *Blayney*, 21 Q. B. D. 107.

(*n*) This is the rate usually allowed in equity; Sug. V. & P. 643; 2 Dart, V. & P. 708; 1 Davidson, Prec. Conv. 575, 576, 4th ed.; 483, 5th ed.

other ordinary profits of the property (*o*): but the vendor shall retain possession or receipt of the rents and profits until the purchase shall be actually completed, when he shall account to the purchaser for all rents and profits accrued due since the proper time for completion (*p*).

(2.) If the vendor shall be in occupation of the property sold, he shall pay a fair occupation rent from the proper time for completion until the time of actual completion (*q*).

(3.) If the delay in completion shall be attributable to the vendor, and the purchaser shall appropriate his money to the purchase by depositing it in a bank or otherwise, and giving the vendor notice of such appropriation, the purchaser shall, as from the time of such appropriation, pay no more interest on the purchase-money, except such interest, if any, as he shall receive in respect of such deposit (*r*); but if the delay in completion shall be attributable to the purchaser, the purchaser shall not be exonerated from his liability to pay interest on the purchase-money by any such appropriation of his money to the purchase (*s*).

Has the vendor a right of re-sale without express stipulation?

We have already briefly described the contracting parties' remedies by application to the Court (*t*). It remains to inquire whether, in the absence of express stipulation, a vendor of land has the right to re-sell, in case the purchaser make default in performing the contract. This appears exceedingly doubtful. It

(*o*) *Paine* v. *Meller*, 6 Ves. 349, 352; *Hardwicke* v. *Sandys*, 12 M. & W. 761; *Monro* v. *Taylor*, 8 Hare, 51, 70, 3 Mac. & G. 713; Sug. V. & P. 627.

(*p*) *M'Namara* v. *Williams*, 6 Ves. 143; Seton on Decrees, 1859, 1870, 5th ed.

(*q*) *Sheruin* v. *Shakspear*, 5 De G. M. & G. 517, 18 Jur. 843; *Metropolitan Ry. Co.* v. *Defries*, 2 Q. B. D. 189, 387. See *Leggott* v. *Metropolitan Ry. Co.*, L. R. 5 Ch. 716.

(*r*) *Roberts* v. *Massey*, 13 Ves. 561; *Regent's Canal Co.* v. *Ware*, 23 Beav. 575, 587; 1 Davidson, Prec. Conv. 573, 574, 4th ed.; 480, 481, 5th ed.

(*s*) Sug. V. & P. 628; 1 Dart, V. & P. 708, 709, 716-18.

(*t*) Above, pp. 30—32.

was incidentally held by Bacon, V.-C., in *Noble* v. *Edwardes* (*u*), that, if the purchaser unjustly repudiate the contract, as by refusing to accept a good title, the vendor may re-sell, after notice to the purchaser of his intention to do so, and sue the purchaser for the amount of any deficiency in price occurring on the re-sale. The V.-C.'s judgment was reversed for other reasons by the Court of Appeal, which made no pronouncement as to the correctness of his decision on the point in question. And his decision has been accepted by the editors of Dart's Vendors and Purchasers (*v*), and Davidson's Precedents in Conveyancing (*w*), as an authority for the proposition that the vendor of land has the right of re-sale, on breach of contract by the purchaser, without any express stipulation to that effect. But the correctness of this opinion seems questionable. The V.-C. held (*x*) that the common law gives to the vendor of land the same right of re-sale, in case of the purchaser's default, as it gives to a vendor of chattels. It is to be observed, however, that the assertion of a right *at common law* for the vendor of goods to re-sell them upon the buyer's default rests upon very slender authority (*y*). And the utmost extent of the common law

(*u*) 5 Ch. D. 378, 388. It does not appear that the decision of this point was really necessary. The action was brought by a vendor, who had re-sold at a loss, to enforce his claim at common law for damages for breach of contract. All that the V.-C. decided was that the vendor was entitled to sue for the difference between the original contract price and the price on the re-sale: see 5 Ch. D. 392. But it seems that the vendor was clearly entitled to make this claim at law, even though the re-sale were wrongful; see *Stephens* v. *Wilkinson*, 2 B. & Ad. 320; *Page* v. *Cowasjee*, L. R. 1 P. C. 127; Benjamin on Sale, 648, 654, 2nd ed.

(*v*) P. 185, 6th ed.

(*w*) P. 476, 5th ed.

(*x*) 5 Ch. D. 388.

(*y*) In Benjamin on Sale, 2nd ed. 1873, pp. 649, 655, it is laid down that the cases decide expressly that the vendor has no right to re-sell, for they determine that he is responsible for nominal damages for non-delivery of the goods where there is no difference between the contract and the market price thereof; and in support of this proposition *Valpy* v. *Oakeley*, 16 Q. B. 941, and *Griffiths* v. *Perry*, 1 E. & E. 680, are cited. In *Ex parte Stapleton, Re Nathan*, 1879, 10 Ch. D. 586, it was decided that an unpaid vendor of goods, who had re-sold

authorities appears to be to allow to an unpaid vendor of goods a right of sale, after notice, on the buyer's default, to realize his lien for the price, similar to the right of sale, after due demand and notice, given to a pledgee of goods where a day is fixed for payment (*z*). But the lien, which a vendor of land has for the price pending completion is a purely equitable charge (*a*), quite different from the common law right of a pledgee or an unpaid vendor of chattels. It does not appear to follow therefore that a vendor of land can enforce his equitable lien by sale, because an unpaid vendor of goods may, in certain circumstances, realize his common law lien by sale. And the proper remedy to enforce an unpaid vendor's lien on lands sold appears to be to apply to a Court of Equity for an order for sale (*b*). It is submitted, therefore, that the better opinion is still that expressed, before the case of *Noble* v. *Edwardes*, by the authors of Davidson's Precedents in Conveyancing (*c*) ; namely, that a re-sale to enforce the vendor's lien for the price in case of the purchaser's default, can only be lawfully made with the authority of a Court of Equity or Bankruptcy. It appears, however, that, as in

(after notice of his intention to do so) upon the purchaser's bankruptcy, was entitled to prove for a deficiency in price on the re-sale. But it appears that he would have had this right even though the re-sale were wrongful; *Stephens* v. *Wilkinson*, 2 B. & Ad. 320; *Page* v. *Cowasjee*, L. R. 1 P. C. 127; Benj. Sale, 654, 2nd ed. Mr. M. D. Chalmers, however, in his Digest of the Law of Sale of Goods (1890), sect. 50 (3), evolved out of certain *obiter dicta* in *Page* v. *Cowasjee*, L. R. 1 P. C. 145; *Lord* v. *Price*, L. R. 9 Ex. 55, and *Ex parte Stapleton*, *ubi sup.*, the rule afterwards adopted in the Sale of Goods Act, 1893, stat. 56 & 57 Vict. c. 71, s. 48 (3), viz., "Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract."

(*z*) See preceding note; and *Johnson* v. *Stear*, 15 C. B. N. S. 330; *Pigot* v. *Cubley*, ib. 701; Blackburn, J., *Donald* v. *Suckling*, L. R. 1 Q. B. 585, 616; Blackburn on Sale, 325, cited Benj. Sale, 644, 2nd ed.

(*a*) See Jessel, M. R., *Lysaght* v. *Edwards*, 2 Ch. D. 499, 506, 507; above, p. 41.

(*b*) *Bowles* v. *Rogers*, 6 Ves. 95, n.; Seton on Decrees, 1901-5, 5th ed.

(*c*) Vol. i., pp. 568-70, 4th ed.

the case of goods (*d*), a re-sale made on the purchaser's default by a vendor of lands, without any express power to re-sell, does not rescind the original contract; that, even if re-sale in such circumstances be unlawful, the vendor may sue the original purchaser or prove in his bankruptcy for any deficiency in price occurring on the re-sale (*e*); and that, if the re-sale result in an excess over the original price, the vendor must pay over the amount of such excess to the original purchaser (*f*). But if re-sale by a vendor of lands on the purchaser's default be unlawful without the authority of the Court, it is questionable whether the vendor would be entitled to recoup himself the expenses of re-sale out of the proceeds thereof (*g*). And it seems very doubtful whether a purchaser on a re-sale made without the authority of the Court would obtain a good title, if he had notice of the original contract for sale (*h*). In this respect the case of lands differs entirely from that of goods, in which the purchaser on a lawful re-sale now obtains a good title under an express enactment in the Sale of Goods Act, 1893 (*i*).

(*d*) See Benj. Sale, 648, 654, 2nd ed.; *Maclean* v. *Dunn*, 4 Bingh. 722; *Stephens* v. *Wilkinson*, 2 B. & Ad. 320; *Tage* v. *Cowasjee*, L. R. 1 P. C. 127.

(*e*) *Ex parte Seaforth*, 19 Ves. 235; *Hope* v. *Booth*, 1 B. & Ad. 498; *Gray* v. *Gray*, 1 Beav. 199; *Harding* v. *Harding*, 4 My. & Cr. 514.

(*f*) *Greaves* v. *Ashlin*, 3 Camp. 426; *Valpy* v. *Oakeley*, 16 Q. B. 941; *Griffiths* v. *Perry*, 1 E. & E. 680. The contrary appears to be laid down in 1 Davidson, Prec. Conv. 570, 4th ed., and 1 Dart, V. & P. 185; but *Ex parte Hunter*, 6 Ves. 94, 97, cited as the authority for these statements, was a case of re-sale under an express power of re-sale, whereby the original contract is rescinded; *Lamond* v. *Davall*, 9 Q. B. 1030; Sug. V. & P. 39.

(*g*) 1 Davidson, Prec. Conv. 570, 4th ed. Note that Bacon, V.-C., decided nothing in *Noble* v. *Edwardes*, 5 Ch. D 378, 392, as to the vendor's right to recover the expenses of re-sale.

(*h*) He might, of course, obtain a good title as a *bonâ fide* purchaser *without* notice of the original sale.

(*i*) Stat. 56 & 57 Vict. c. 71, s. 48 (2).

CHAPTER III.

OF THE USUAL CONDITIONS OF SALE.

Stipulations usually made in formal contracts.

HAVING thus given an outline of the main duties imposed upon the parties to the contract and their remedies for its breach, and attempted to state the terms of an open contract, we will now endeavour to complete our general view of the effect of a sale of land by pointing out in what particulars the rights and obligations of the parties are usually expressed or modified, in formal contracts, by special stipulation. We will first examine the conditions generally made on sales by auction.

Reserving the right to bid at an auction.

1. As we have seen, on a sale of land by auction the particulars or conditions must state whether the land will be sold without reserve or subject to a reserved price, or whether a right to bid is reserved; and if the sale be announced to be without reserve, it will not be lawful for the vendor to bid, either in person or by agent (*a*). It is therefore the practice expressly to reserve to the vendor the right to bid as often as he may please (*b*); and it is usually stipulated that the vendor and his agents may bid as often as he or they may please (*c*), notwithstanding the doubt judicially expressed as before mentioned (*d*) whether it be lawful for a vendor of land to employ more than one puffer at an auction. The lowest amount by which the biddings shall advance is generally specified; and it is also pro-

(*a*) Stat. 30 & 31 Vict. c. 48, s. 5; above, p. 21.

(*b*) Above, p. 21.

(*c*) 1 Davidson, Prec. Conv. 607, 4th ed.; 1 Key & Elphinstone, Prec. Conv. 258, 4th ed.

(*d*) Above, p. 21.

vided that no bidding shall be retracted, the latter stipulation being inserted for whatever it may be worth, notwithstanding that it is thought to be unenforceable (*e*).

Deposit; signing a memorandum.

2. We have seen that no deposit of any part of the purchase-money can be lawfully demanded after an open contract for sale has been concluded; as the whole price is not payable until the time for completion (*f*). But on sales of land by auction it is always provided that a deposit of a certain proportion (as ten per cent.) of the purchase-money shall be paid by the purchaser immediately on signing the contract (*g*). It is also invariably stipulated that the purchaser shall sign a memorandum of the contract immediately after the sale. This stipulation is absolutely necessary on account of the Statute of Frauds (*h*): but it does not appear that it can be enforced (*i*).

Time for completion.

3. A day is always fixed for the completion of the contract. In such cases it was said that at law time was of the essence of the contract; that is to say, the Courts of Common Law (not unreasonably) held the parties to mean what they said (*j*), and therefore considered that a stipulation to complete the purchase on a given day bound the vendor to have shown and verified a good title and to be ready to convey on that day; in default of which the purchaser was entitled either to rescind the contract or to treat it as broken, and to recover in the former case his deposit, if any, and in the latter, his deposit together with his expenses of the agreement and of

(*e*) See above, p. 18; 1 Davidson, Prec. Conv. 519, 607, 4th ed.; 432, 525, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 258, 4th ed.

(*f*) Above, pp. 22, 37, 38.

(*g*) 1 Davidson, Prec. Conv. 607, 4th ed.; 519, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 258, 4th ed.

(*h*) Above, pp. 3, 18—20.

(*i*) See above, pp. 18—20.

(*j*) *Marshall* v. *Powell*, 9 Q. B. 779.

investigating the title as well (*k*). In equity, however, it was well established that neither party to a contract for sale of land should lose his right to specific performance merely through failure to comply with some stipulation as to time, if time were not of the essence of the contract. That is to say, the Courts of Equity, in administering their own peculiar remedies, held that they were not concluded by the letter of an agreement to do some act within a given time, but would look to what they called "the substance of the contract," and ascertain whether a stipulation as to time were intended to be material or merely formal. And they granted specific relief, if there were no unreasonable delay, notwithstanding the want of exact compliance with a formal stipulation as to time, upon a principle analogous to that on which they decreed the redemption of mortgages after the day fixed for redemption was past (*l*). The nature of this jurisdiction is thus described by Lord Cairns (*m*) :—"A Court of Equity will relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps

(*k*) *Berry* v. *Young*, 2 Esp. 640, n.; *Wilde* v. *Fort*, 4 Taunt. 334; *Hanslip* v. *Padwick*, 5 Ex. 615; Sug. V. & P. 257-9; Dart, V. & P. 482, 1071, 1072, 1076.

(*l*) *Pincke* v. *Curteis*, 4 Bro. C. C. 329; Redesdale, Ir. C., *Lennon* v. *Napper*, 2 Sch. & Lef. 684; Eldon, C., *Seton* v. *Slade*, 7 Ves. 265, 273-5; *Radcliffe* v. *Warrington*, 12 Ves. 326; *Hearne* v. *Tenant*, 13 Ves. 287; *Hipwell* v. *Knight*, 1 Y. & C. Ex. 401; *Parkin* v. *Thorold*, 16 Beav. 59; *Roberts* v. *Berry*, 3 De G. M. & G. 284; Fry, Sp. Perf. § 1072, p. 489. In recent times, equity judges seem to have thought it necessary to allege that, notwithstanding the exercise of this jurisdiction, the contract is construed in the same manner in equity as at law; Romilly, M.R., *Parkin* v. *Thorold*, 16 Beav. 66; Knight Bruce, L.J., *Roberts* v. *Berry*, 3 De G. M. & G. 290; Cairns, C., *Tilley* v. *Thomas*, L. R. 3 Ch. 67. But there can be no doubt that the Courts of Equity, in assuming a jurisdiction to enforce contracts which were broken at law by failure to observe a stipulation as to time, have practically interfered with the legal effect of the contract; and when one considers all the delays that have been condoned in equity on the ground that time is not of the essence of a contract to sell land, it appears very questionable whether this doctrine has really conferred any benefit upon the community.

(*m*) In *Tilley* v. *Thomas*, L. R. 3 Ch. 61, 67.

towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in *Roberts* v. *Berry* (*n*)), there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. Of the three grounds against interference mentioned by Lord Justice Turner, 'express stipulations' requires no comment. The 'nature of the property' is illustrated by the case of reversions, mines, or trades. The 'surrounding circumstances' must depend on the facts of each particular case" (*o*). Under the Judicature Act, 1873 (*p*), stipulations in contracts, as to time or otherwise, which would not before the commencement of the Act have been deemed to be or to become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have theretofore received in equity. On an ordinary sale of land, it is not usual, in fixing the date of completion, expressly to make time of the essence of the contract.

Effect of fixing a day for completion without further stipulation.

When a day is fixed for the completion of the contract, without further special stipulation, the purchaser becomes entitled to the rents and profits and liable to discharge the outgoings as from that day, the vendor taking the profits and discharging the outgoings up to that day (*q*). And if the purchase be not completed on that day, and the delay be attributable to the purchaser, he is bound to pay interest on the purchase-money as from that day, whether he have entered into possession or not. But if the delay be attributable to

(*n*) 3 De G. M. & G. 284, 291.
(*o*) See Fry, Sp. Perf. §§ 1075-1091, pp. 491-8.
(*p*) Stat. 36 & 37 Vict. c. 66, s. 25 (7), amended by 38 & 39 Vict. c. 77, s. 10.
(*q*) Sug. V. & P. 627; above, pp. 40, 41.

the vendor, the purchaser is chargeable with interest (and consequently entitled to the profits and liable to the outgoings) only from the time when he either actually took or might safely have taken possession, the latter time being when a good title has been shown and verified (*r*). The purchaser may, however, discharge himself from the liability to pay interest, where the delay is attributable to the vendor's and not his own fault, by appropriating his money to the purchase in manner before explained (*s*). But, as we shall see, these matters and especially the payment of interest are usually provided for by special stipulation in formal contracts.

Fixtures or timber to be taken at a valuation.

4. If it be intended that the fixtures or timber or other trees upon the property sold shall be paid for at a valuation in addition to the sum agreed on as the price of the land, a special stipulation to that effect must form part of the contract of sale: otherwise the purchaser will be entitled to have the fixtures and trees, as passing with the land, without extra payment (*t*). Such a stipulation is very commonly made, and the mode of valuation is usually specified; for instance, by two valuers to be appointed one by either party, or an umpire to be appointed by the valuers. But an agreement to sell property at a price to be ascertained by valuation made in a particular way does not result in an enforceable contract if that way be not pursued; for if the parties agree that the price is to be fixed by A., and A. do not fix it, the price is not reduced to the required certainty (*u*); and the Court will not, as a rule, provide other means of fixing the price, for that

(*r*) *Pincke* v. *Curteis*, 4 Bro. C. C. 329, 333, n.; Leach, V.-C., *Esdaile* v. *Stephenson*, 1 S. & S. 122, 123; *Jones* v. *Mudd*, 4 Russ. 118; Sug. V. & P. 627 *sq.*; 2 Dart, V. & P. 708, 709.

(*s*) Above, p. 42.

(*t*) *Colegrave* v. *Dias Santos*, 2 B. & C. 76.

(*u*) See above, p. 4.

would be holding the parties bound by a contract different from that which they made (*v*). It is therefore proper to stipulate, after providing that fixtures or timber shall be taken at a valuation to be made in a particular manner, that failing such valuation they shall be paid for at a fair valuation or at their fair value. In such case, the Court will, it seems, direct a reference, if necessary, to ascertain the price (*w*).

Commencement of title.

5. It is usual to specify the instrument of disposition with which the title shall commence, especially if it be intended to confine the time, for which title is to be shown, within a shorter limit than the period fixed by law (*x*). No such stipulation is necessary if the vendor propose to deliver an abstract commencing with a good root of title (*y*) and extending over the whole period, for which title can by law be required to be shown. But if it be desired effectually to limit the purchaser's rights, as defined by law, in the matter either of the time for which he may require title to be shown or of the nature of the instrument with which the title is to commence, a fair and explicit stipulation to the effect desired must be made (*z*).

Limiting time for making requisitions on title.

6. It is usual to provide that the purchaser's requisitions on or objections to the title, or anything else connected with the sale, shall be sent to the vendor's solicitors within a limited time (as twenty-one days) after the delivery of the abstract of title, that in this respect time shall be of the essence of the contract (*a*),

(*v*) *Milnes* v. *Gery*, 14 Ves. 400; *Blundell* v. *Brettargh*, 17 Ves. 232; *Collins* v. *Collins*, 26 Beav. 306; *Vickers* v. *Vickers*, L. R. 4 Eq. 529; Fry, Sp. Perf. §§ 354-367, pp. 161-7.

(*w*) Sug. V. & P. 287, 288; 1 Dart, V. & P. 257-9; 1 Davidson, Prec. Conv. 522, 523, 607, 608, 4th ed.; 435, 513, 519, 5th ed.

(*x*) See above, p. 28.

(*y*) Above, p. 34.

(*z*) See *Re Marsh and Earl Granville*, 24 Ch. D. 11.

(*a*) See above, p. 49.

and that in default of or subject only to any such requisitions and objections so made the purchaser shall be taken to have accepted the title (*b*). And it is sometimes stipulated that any replies to the vendor's answers to the requisitions must be made within a specified time (*c*). Where such stipulations are made, it is not desirable, in the vendor's interest, to provide that the abstract shall be delivered within a specified time; as if he should fail to deliver it within the period appointed, the condition limiting the time, within which the purchaser is to make his requisitions, will fail of effect (*d*). It is further held with regard to such stipulations that the time thereby limited only begins to run from the delivery of a perfect abstract, that is, as perfect an abstract as the vendor is able to furnish at the time of delivery, although it may not show a complete title (*e*). Hence it is sometimes provided in conditions of sale that, for the purpose of any requisition or objection, the abstract shall be deemed perfect, if it supply the information suggesting the same, although otherwise defective. Such a stipulation is sanctioned by the practice of eminent conveyancers: but it has never been decided how far it is efficacious; and as regards the enforcement of specific performance its operation would appear to be very limited (*f*). The stipulation, that in default of requisitions or objections made within the time limited, the purchaser shall be taken to have accepted the title, does not bind him to take the property sold, if on the face of the abstract the vendor

(*b*) 1 Davidson, Prec. Conv. 539, 614, 4th ed.; 449, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 265, 4th ed.

(*c*) 1 Davidson, Prec. Conv. 521-2, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 265, 4th ed.

(*d*) *Upperton* v. *Nickolson*, L. R. 6 Ch. 436; 1 Dart, V. & P. 141.

(*e*) *Hobson* v. *Bell*, 2 Beav. 17; *Morley* v. *Cook*, 2 Hare, 111; *Blackburn* v. *Smith*, 2 Ex. 789; *Gray* v. *Fowler*, L. R. 8 Ex. 249, 279; Sug. V. & P. 21; 1 Dart, V. & P. 142, 184, 321.

(*f*) See 1 Dart, V. & P. 142; 1 Davidson, Prec. Conv. 540, 4th ed.; 450, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 265, 4th ed.; above, pp. 31, 32.

show no title to convey the same, even though this objection were not taken within the time appointed (*g*).

As we have seen (*h*), in the absence of any stipulation as to time, the vendor is bound to deliver the abstract within a reasonable time after the contract, and the purchaser is bound to make his objections, if any, to the title within a reasonable time after the delivery of the abstract; and if the latter make undue delay in examining or accepting the title, he may lose his right to enforce the specific performance of the contract (*i*). And retainer of the abstract for a long time, without making any requisitions, may amount to an acceptance of the title (*j*). In case of unreasonable delay on the purchaser's part, the vendor may send him a notice requiring him to accept or reject the title within a definite period (which must be a *reasonable* space of time as from the date of the notice), on pain of the vendor's putting an end to the contract; and if the purchaser fail to comply with such a notice, the Court will no longer enforce specific performance of the contract (*k*). What is a reasonable time is a question of fact to be determined with regard to the circumstances of each particular case. If the vendor delay in sending the abstract of title, the purchaser should ask for it; if he fail to do this, he will be considered to have waived the delay, and will be precluded from asserting the non-delivery of the abstract within the appointed time or a reasonable time, as the case may be, to be a breach of contract by the vendor (*l*).

Purchaser should ask for abstract.

(*g*) *Want* v. *Stallibrass*, L. R. 8 Ex. 175; *Re Tanqueray Willaume and Landau*, 20 Ch. D. 465, 473, 474.

(*h*) Above, p. 40.

(*i*) *Spurrier* v. *Hancock*, 4 Ves. 667; Fry, Sp. Perf. § 1103, p. 503.

(*j*) Romilly, M. R., *Pegg* v. *Wisden*, 16 Beav. 239, 244, 245; Fry, Sp. Perf. § 1351, p. 601.

(*k*) *Taylor* v. *Brown*, 2 Beav. 180, 183; Sug. V. & P. 268, 269; Fry, Sp. Perf. §§ 1092 *sq.* pp. 499 *sq.*; *Compton* v. *Bagley*, 1892, 1 Ch. 313; above, p. 40.

(*l*) Sug. V. & P. 260, 261; 1 Dart, V. & P. 346, 347.

Reservation to vendor of right to rescind the contract.

7. The vendor generally reserves the right to rescind the contract if the purchaser shall insist on any requisition or objection which he shall be unable or unwilling to remove or comply with (*m*). In the absence of such a stipulation, neither party is at liberty to recede from the agreement without the consent of the other; this is of the very essence of contract. A right so reserved to rescind the contract must be exercised reasonably and in good faith, and not capriciously (*n*): but if this limitation be observed, the present tendency of the Courts is not otherwise to interfere with the effect of such a condition by enforcing specific performance against a vendor who has availed himself of the letter of a stipulation entitling him to rescind. The condition is now very frequently framed in such a way as to give the purchaser the opportunity of withdrawing the requisition, with which the vendor cannot or will not comply (*o*); and this certainly appears to be the fair and proper course to take.

Evidence of identity.

8. The purchaser's right to require evidence of the identity of the property sold with that described in the title-deeds (*p*) is usually limited by a stipulation, which precludes him from calling for other evidence of identity than is afforded by comparing the descriptions in the title-deeds with that contained in the contract (*q*). But this stipulation, in its common form, does not enable the vendor to enforce specific performance, with-

(*m*) This has long been usual; *Falkner* v. *Equitable Reversionary Co.*, 4 Drew. 352; Juridical Socy. Papers, ii. 590; 1 Davidson, Prec. Conv. 564, 4th ed.

(*n*) *Re Dames and Wood*, 29 Ch. D. 626; *Re Glenton and Saunders to Haden*, 53 L. T. N. S. 434; *Re Terry and White's Contract*, 32 Ch. D. 14; *Re Starr Bowkett Bdg. Socy. and Sibun's Contract*, 42 Ch. D. 375; *Re Deighton and Harris's Contract*, 1898, 1 Ch. 458; see *Greaves* v. *Wilson*, 25 Beav. 290; *Bowman* v. *Hyland*, 8 Ch. D. 588; *Smith* v. *Wallace*, 1895, 1 Ch. 385; Re Jackson & Haddingford, 1905, 1 Ch. 633.

(*o*) 1 Key & Elphinstone, Prec. Conv. 266, 4th ed.

(*p*) Above, p. 28.

(*q*) 1 Davidson, Prec. Conv. 610, and n., 4th ed.; 520, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 262, 5th ed.

out further evidence of identity, if such comparison afford no evidence that the property sold corresponds with that or part of that described in the deeds (*r*).

Errors of description; compensation.

9. It is usually provided that errors of description shall not annul the sale, and either that no compensation or that reasonable compensation shall be allowed therefor (*s*). The better opinion is that an agreement allowing no compensation for errors of description applies to all errors, both great and small, so as to preclude the purchaser from requiring (as otherwise he might require (*t*)) specific performance of the contract with compensation: but it is held that the *vendor* is not thereby enabled to force upon the purchaser a property which has been substantially misdescribed (*u*). An express contract to make compensation for errors of description does not appear to add or subtract anything to or from the purchaser's ordinary right to enforce specific performance of the contract with compensation (*v*): but it gives him the right, which he would not otherwise possess (*w*), to recover compensation for an error innocently made by the vendor but not discovered until after the completion of the contract (*x*). The vendor cannot, by reason of a condition to allow compensation, oblige the purchaser to take a property substantially different from that sold (*y*); but such a condition may cover a considerable deficiency in quantity even when the vendor is seeking to enforce the contract, if the

(*r*) *Flower* v. *Hartopp*, 6 Beav. 476; *Carling* v. *Austin*, 2 Dr. & Sm. 129; and see Sug. V. & P. 26; 1 Dart, V. & P. 174, 175.

(*s*) 1 Davidson, Prec. Conv. 559, 4th ed.; 464, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 267, 4th ed.

(*t*) See above, p. 36.

(*u*) *Nicoll* v. *Chambers*, 11 C. B. 996; *Cordingley* v. *Cheeseborough*, 4 De G. F. & J. 379; *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603; *Re Terry and White's Contract*, 32 Ch. D. 14; 2 Dart, V. & P. 740; *Jacobs* v. *Revell*, 1900, 2 Ch. 858.

(*v*) 2 Dart, V. & P. 741; above, p. 36.

(*w*) *Joliffe* v. *Baker*, 11 Q. B. D. 255.

(*x*) *Palmer* v. *Johnson*, 13 Q. B. D. 351.

(*y*) *Flight* v. *Booth*, 1 Bing. N. C. 370, 4 L. J. N. S. C. P. 66.

Court be satisfied that, substantially, the purchaser will get the sort of property he contracted to buy (*z*). It is considered that a condition precluding any right to compensation is, on the whole, more advantageous to the vendor (*a*).

Conveyance.

10. The execution of the conveyance by the vendor and the payment of the balance of the price by the purchaser on the day fixed for completion is usually the subject of express provision; and it is generally stipulated that the purchaser shall bear the expense of any assurance or act necessary for getting in or releasing any outstanding estate or interest or perfecting the vendor's title (*b*); and it is sometimes declared that the purchaser shall bear the expense of the concurrence in the conveyance of all necessary parties other than the vendor (*c*).

Apportionment of rents and outgoings.

11. It is usual to provide expressly that the vendor shall be entitled to possession or receipt of the rents and profits and liable to discharge the outgoings up to the day fixed for completion, and the purchaser afterwards; and that the rents and outgoings shall, if necessary, be apportioned for this purpose (*d*).

Interest in case of delay in completion.

12. It is usually stipulated that the purchaser shall pay interest at a specified rate on his unpaid purchase-money, if from any cause whatever the purchase be not completed on the day fixed for completion (*e*). If the purchaser bind himself to pay interest by an express stipulation in terms like these, he must pay interest in

(*z*) *Re Fawcett and Holmes*, 42 Ch. D. 150.

(*a*) 1 Davidson, Prec. Conv. 468, 5th ed.

(*b*) See above, p. 38; 1 Davidson, Prec. Conv. 570, 612, and n., 4th ed.; 1 Key & Elphinstone, Prec. Conv. 263, 4th ed.

(*c*) See above, p. 38.

(*d*) See above, pp. 40, 41; 1 Davidson, Prec. Conv. 613, 4th ed.; 1 Key & Elphinstone, Prec. Conv. 259, 4th ed.

(*e*) See above, p. 41; 1 Davidson, Prec. Conv. 576, 613, 4th ed.; 483, 522, 5th ed.

case of delay in completion, notwithstanding that the delay be attributable to the state of the title or otherwise to the vendor; and he will not be relieved from this obligation unless the delay be caused by the vendor's vexatious conduct, dealing in bad faith or gross negligence (*f*). Nor can he, according to the better opinion, discharge himself from his liability to pay interest by appropriating his money to the purchase (*g*). Sometimes the contract is so worded as to bind the purchaser to pay interest in case of delay in completion arising from any cause whatever *other than the wilful default of the vendor;* and in such case the purchaser must pay interest unless the vendor were in wilful default, and such default were the effective cause of the delay (*h*). In this form the stipulation has been fruitful of litigation, with the result that little else has been clearly established than the futility pointed out by Lord Bowen of attempting a precise definition of the meaning of "wilful default" in such contracts (*i*), and the question, what conduct amounts to wilful default, can only be solved by consideration of the circumstances of each particular case (*j*).

(*f*) *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517, 529; *Bannerman* v. *Clarke*, 3 Drew. 632; *Vickers* v. *Hand*, 26 Beav. 630; *Williams* v. *Glenton*, L. R. 1 Ch. 200; Sug. V. & P. 633-7; Dart, V. & P. 144, 719, 723.

(*g*) *Re Riley* to *Streatfield*, 34 Ch. D. 386.

(*h*) See *Re Mayor of London and Tubbs' Contract* and *Bennett* v. *Stone*, cited below.

(*i*) Default is said to mean not doing what is reasonable in the circumstances; wilful to imply nothing blameable, but merely the result of the spontaneous action of the will; Bowen, L. J., 31 Ch. D. 174, 175; "moral delinquency, intentional delay, wilful obstruction on the part of a vendor may be all absent, and yet there may be wilful default"; C. A. 1893, 3 Ch. 281.

(*j*) See *Re Young and Harston's Contract*, 31 Ch. D. 168, where it was held wilful default for the vendor to go abroad two days before the day fixed for completion; *Re Hetling and Merton's Contract*, 1893, 3 Ch. 269, where a mortgagee was abroad and the vendor relied on a power of attorney from him, which was held insufficient—this was considered wilful default; *Re Mayor of London and Tubbs' Contract*, 1894, 2 Ch. 524, where the vendors, having omitted to examine their title, misdescribed it in the contract—this was considered by Lindley and Lopes, L. JJ., not to be wilful default, *diss.* Kay, L. J.; *Re Wilsons and Stevens' Contract*, 1894, 3 Ch. 546, where it was held wilful

Right to re-sell.

13. In conditions of sale by auction the vendor usually reserves the right to re-sell the property, if the purchaser fail to comply with the conditions, and to recover from the purchaser any deficiency in price occurring on the re-sale. But such a stipulation is not commonly inserted in contracts of private sale. A re-sale under such a condition operates as a rescission of the original contract. The vendor is therefore entitled to retain for his own benefit any excess over the original contract price which may be realised on the re-sale (*k*).

Conditions of sale by auction of freeholds in one lot.

The following is a simple form of conditions of sale by auction of freeholds in one lot. They are intended to be annexed to particulars of sale containing the description of the property offered:—

Bidding; right to bid reserved.

1. No person shall advance less than *l.* at a bidding, and no bidding shall be retracted (*m*). There will be a reserve price; and the vendor reserves the right to bid in person or by his agents as often as he or they may please (*n*). Subject to the rights so reserved to the vendor, the highest bidder shall be the purchaser. If any dispute shall arise respecting a bidding, the property shall be put up again and resold.

Deposit; contract to be signed.

2. The purchaser shall immediately after the sale pay a deposit of 10*l.* per cent. of his purchase-money into the hands of [*the auctioneer* or *the vendor's solicitors*] and sign the subjoined agreement (*o*).

default for a vendor of copyholds not to have procured certain admissions necessary to enable him to convey the legal estate; *Re Strafford and Maples*, 1896, 1 Ch. 235, where Kekewich, J., held it wilful default for a vendor not to have procured the concurrence of necessary parties to the conveyance; *Re Woods and Lewis's Contract*, 1898, 1 Ch. 433, 2 Ch. 211; *North* v. *Percival*, 1898, 2 Ch. 128; *Bennett* v. *Stone*, 1902, 1 Ch. 226; 1903, 1 Ch. 509, where four judges were exactly divided in opinion whether it was wilful default for a vendor to insist in good faith upon an unreasonable contention as to the form of the conveyance.

(*k*) *Ex parte Hunter*, 6 Ves. 94; *Lamond* v. *Davall*, 9 Q. B. 1030; Sug. V. & P. 39.

(*m*) See above, pp. 18, 47.

(*n*) See above, pp. 21, 47.

(*o*) See above, pp. 22, 47.

3. The fixtures, timber and other trees, tellers, pollards, saplings and underwood upon the property, down to the value of 1*s.* per stick, shall be paid for by the purchaser at a valuation to be made as hereinafter provided, or failing such valuation, at their fair value (*p*). The valuation shall be made by two valuers to be appointed one by the vendor and the other by the purchaser, or by an umpire to be appointed by the valuers, or if either the vendor or the purchaser shall refuse or neglect to appoint a valuer or to notify his appointment of a valuer to the other party in writing within seven days after being requested by the other party to do so, or if the valuer appointed by either party shall refuse or neglect to act for seven days after receiving notice in writing from the other party requiring him to proceed with the valuation, then by the other party's valuer alone, provided that his appointment shall have been duly notified in writing to the opposite party (*q*). Fixtures and timber to be paid for at a valuation.

4. The title shall commence with [*a deed or other instrument of such a date, the nature of which must be accurately set out* (*r*). *Any special conditions as to title, which may be necessary, may be inserted here*]. Commencement of title.

5. The purchaser shall send his requisitions and objections (if any) in respect of the title and all matters appearing on the abstract, particulars or conditions to the office, No. —, —— Street, —— of Messrs. ——, the vendor's solicitors, within twenty-one days from the day of the delivery of the abstract, and in this respect time shall be of the essence of the contract (*s*). In Time limited for making requisitions on title, &c.

(*p*) See above, p. 50. In many cases it would be sufficient to say "by two valuers, or their umpire, to be appointed in the usual way, or otherwise at their fair value": but this would not authorize one party's valuer, in case of the default of the other party or his valuer, to make a valuation binding on the other party. That is a matter which must be expressly provided for, if desired. See *Bos* v. *Helsham*, L. R. 2 Ex. 72.

(*q*) The last words are inserted to remind the parties of the fact, that the appointment of a valuer is not completely made until it has been notified to the opposite party; *Tew* v. *Harris*, 11 Q. B. 7.

(*r*) See above, p. 51.

(*s*) See above, p. 51.

default of or subject only to any such requisitions and objections so made, the purchaser shall be taken to have accepted the title.

Reservation to vendor of right to rescind the contract.

6. If the purchaser shall insist on any requisition or objection as to the title, evidence of title, conveyance, possession, receipt of rents or any other matter appearing on the abstract, particulars or conditions or connected with the sale, which the vendor shall be unable or unwilling to remove or comply with, the vendor shall be at liberty, notwithstanding any negotiation or litigation in respect of such requisition or objection (*t*), to give to the purchaser or his solicitor notice in writing of his intention to rescind the contract for sale unless such requisition or objection be withdrawn; and if such notice be given and the requisition or objection be not withdrawn within ten days after the day on which the notice was sent, the contract shall without further notice be rescinded (*u*). The vendor shall thereupon return to the purchaser his deposit, but without any interest, costs of investigating the title, or other compensation or payment whatever.

Identity.

7. The purchaser shall admit the identity of the property purchased with that comprised in the muniments offered by the vendor as the title to such property, upon the evidence afforded by a comparison of the descriptions contained in the particulars of sale and in the muniments (*v*).

No compensation for errors of description.

8. The property is believed, and shall be taken to be correctly described as to quantity and otherwise. The property is sold subject to all chief and other rents, rights of way and water, and other easements (if any) charged or subsisting thereon, and to all leases,

(*t*) These words will not enable the vendor to rescind after final judgment has been given against him in a proceeding for determining the validity of some objection taken by the purchaser; *Re Arbib and Class's Contract*, 1891, 1 Ch. 601.

(*u*) See above, p. 54.

(*v*) See above, p. 54.

tenancies, and occupations, whether mentioned in the particulars of sale or not; and to all rights and claims of lessees, tenants and occupiers (*w*). If any error, misstatement, or omission be discovered in the particulars of sale, the same shall not annul the sale, nor shall any compensation be allowed by the vendor in respect thereof.

Completion.

9. The purchaser shall pay the remainder of his purchase-money, and the value of the fixtures, timber and other trees, tellers, pollards, saplings, and underwood, on the —— day of —— next, at the office aforesaid of Messrs. —— to the vendor or as he shall in writing or otherwise duly authorize. Upon such payment the vendor and all other necessary parties (if any) will execute a proper assurance of the property to the purchaser; but such assurance, and every other assurance and act (if any) which shall be required by the purchaser for getting in, surrendering, or releasing any outstanding estate, right, title, or interest, or for completing or perfecting the vendor's title, or for any other purpose, shall be prepared, made, and done, by and at the expense of the purchaser (*x*); and every such assurance shall be left at the office aforesaid not less than ten days before the said —— day of —— next.

Rents, outgoings, &c.

10. The rents will be received, possession retained

(*w*) General words like these, which must of course be modified according to the nature of the property sold, are inserted to protect the vendor against rents, easements or tenants' claims of which he may be unaware at the time of sale. They would not enable him to enforce specific performance of the contract subject to any rents, easements or tenancies, which would be serious incumbrances and were known to the vendor, but not mentioned in the particulars; *Heywood* v. *Mallalieu*, 25 Ch. D. 357; *Nottingham Brick & Tile Co.* v. *Butler*, 16 Q. B. D. 778; 1 Dart, V. & P. 177.

(*x*) Words like these have been held to throw upon the purchaser the costs of the concurrence in the conveyance of the vendor's mortgagees; *Re Willett and Argenti*, 5 Times L. R. 476. But if it be intended that the purchaser shall bear the expense of the concurrence in the conveyance of necessary parties other than the vendor, it is better to make an express stipulation to that effect; see above, pp. 38, 56. If the vendor has a clear title in himself it is, of course, unnecessary, and it is simply depreciatory to stipulate that the purchaser shall bear the expense of getting in any outstanding estate.

and the outgoings discharged by the vendor up to the said —— day of —— next. As from that day the outgoings shall be discharged, the rents received and possession taken by the purchaser. The rents and outgoings shall, if necessary, be apportioned between the vendor and the purchaser for the purpose of this condition. If from any cause whatever the purchase shall not be completed on the said —— day of —— next, the purchaser shall pay interest on the remainder of his purchase-money and on the aforesaid value of the fixtures, timber and other trees, tellers, pollards, saplings and underwood, at the rate of ——*l.* per cent. per annum, from that day until the purchase shall be completed; and shall not be entitled to any compensation for the vendor's delay or otherwise (*z*).

Interest.

11. If the purchaser shall fail to comply with the above conditions, his deposit shall thereupon be forfeited, and the vendor shall be at liberty to resell the property at such time, in such manner and subject to such conditions, as he shall think fit; and any deficiency in price which may happen on, and all expenses, which may attend the resale, shall immediately afterwards be paid by the defaulter to the vendor; and, in case of non-payment, shall be recoverable by the vendor as liquidated damages (*a*).

Memorandum to be indorsed on the conditions.

I [*insert name and description*] hereby acknowledge that on the sale by auction this —— day of —— of the property mentioned in the foregoing particulars I was the highest bidder and was declared the purchaser thereof subject to the foregoing conditions at the price of ——*l.*, and that I have paid the sum of ——*l.* by way of a deposit and in part payment of the said purchase-money to [*the auctioneer*] and I hereby agree to pay the

(*z*) See above, p. 56. (*a*) See above, pp. 42—45, 53.

remainder of the said purchase-money and complete the said purchase according to the aforesaid conditions.

As witness my hand this —— day of ——.

[*Purchaser.*]

As agent for Mr. [*insert vendor's name and description* (*b*)] the vendor, I ratify this sale and acknowledge the receipt of the said deposit of ——*l.*

[*Auctioneer.*]

The above conditions are in common form; but they are of course drawn exclusively in the vendor's interest. It is not found, however, that purchasers are deterred from bidding by such conditions, at all events, in London sales (*c*). In the provinces, lands are often sold subject to the common form conditions of the local law society; and some of these conditions are far more favourable to purchasers than those set out above (*d*).

Special conditions of sale.

A few words may be added here with regard to what are called special conditions of sale, which are conditions requiring the purchaser to accept a title shorter or

(*b*) See above, p. 5.

(*c*) This seems to have been the case during the latter half of the last century; see 1 Davidson, Prec. Conv. 505, 506, 4th ed.; Juridical Society Papers, ii. 589 *sq.* Before this, the conditions of sale by auction were usually far less stringent; see 2 Sug. V. & P. 1076, 11th ed.

(*d*) Thus under the common form conditions of sale of the Birmingham Law Society, the purchaser expressly contracts to pay interest at 5*l.* per cent. on delay in completion, but is allowed, if such delay shall arise from any cause other than his own neglect or default, to appropriate his money to the purchase by placing it to a deposit account in a bank and giving notice of such deposit, and is thenceforth chargeable only with the interest given on the deposit; the expense of perfecting the vendor's title or of conveyance by necessary parties other than the vendor is left to fall on the vendor; the vendor has to bear the cost of production of any documents, which are in the possession of a mortgagee, or other incumbrancer, or of a person obliged to produce them at the vendor's request; the vendor is empowered to rescind only if he is unable or on the ground of expense unwilling to comply with some requisition; and compensation is to be given for errors of description if pointed out before completion. The conditions of the Bristol, Liverpool and Manchester Law Societies are nearly as favourable to purchasers. The Birmingham & Manchester Conditions are set out in Farrer's Conditions of Sale (1909) at pp. 314 & 322 resp.

otherwise less perfect than he would be entitled to demand under an open contract, or to take the property sold subject to some incumbrance, easement or right in favour of other persons. Such conditions, in order to be completely binding on the purchaser, must be framed with very great care. It is true that, at law, a purchaser may be bound by a contract to buy a property subject to some defect of title or otherwise, according to the plain meaning of the words used; and so may have no right to recover his deposit if he object to comply with the condition (*e*). But in equity a vendor will not be entitled to enforce the specific performance of such a contract unless he has acted in the greatest good faith. If therefore the special condition be in any way misleading, that is, if it do not fairly and explicitly call the purchaser's attention to the defect to which he is to submit, or if it contain any material misrepresentation however innocently made, as to a matter of fact, the Court will not oblige the purchaser specifically to perform the contract (*f*). And if the condition be obscurely or ambiguously expressed, it will be construed in favour of the purchaser (*g*). But if the facts of the case be honestly and clearly stated, the condition will be binding, although the legal effect of the facts be not stated (*h*). A very common instance of a special condition of sale is that requiring a purchaser of freeholds to accept a title commencing with some instrument less

(*e*) *Best* v. *Hamand*, 12 Ch. D. 1; *Re Davis and Cavey*, 40 Ch. D. 601, 607; *Re National Provincial Bank of England and Marsh*, 1895, 1 Ch. 190; *Scott* v. *Alvarez*, 1895, 2 Ch. 603; above, pp. 31, 32.

(*f*) *Re Banister, Broad* v. *Munton*, 12 Ch. D. 131; *Re Marsh and Earl Granville*, 24 Ch. D. 11; *Nottingham Patent Brick & Tile Co.* v. *Butler*, 16 Q. B. D. 778. As to fraudulent misrepresentation, see *Edwards* v. *M'Leay*, G. Coop. 308, 2 Sw. 287; *Hart* v. *Swaine*, 7 Ch. D. 42; *Joliffe* v. *Baker*, 11 Q. B. D. 255.

(*g*) *Symons* v. *James*, 1 Y. & C. C. C. 487, 490; *Seaton* v. *Mapp*, 2 Coll. 556, 562; *Rhodes* v. *Ibbetson*, 4 De G. M. & G. 787.

(*h*) *Smith* v. *Watts*, 4 Drew. 338; *Re Sandbach and Edmondson's Contract*, 1891, 1 Ch. 99; compare *Williams* v. *Wood*, 16 W. R. 1005.

than forty years old; in such cases, as we have seen, the vendor cannot enforce specific performance according to the letter of the contract, if this instrument be not a good root of title (*i*). So if it be intended that the purchaser shall take the land subject to covenants restrictive of its user, it must be clearly indicated that he is to buy subject to an incumbrance of this nature (*j*). The construction of special conditions of sale is the same, whether they be made on a sale by public auction, or contained in a contract of private sale (*k*).

Stipulations in formal contracts for private sale.

Having thus considered the conditions usually made on sales by auction, it remains to inquire what stipulations are generally inserted in formal agreements for sale by private contract. The practice in this respect has undergone remarkable fluctuation. We find that down to the end of the first half of the last century vendors were apparently content to undertake by express stipulation the obligations which the law cast upon them in the case of an open contract; notwithstanding that those obligations, including the duty of proving a good sixty years' title at the vendor's expense, were far more onerous than they are at present (*l*). After this, a time of exceptional prosperity brought about a brisk market for the sale of land, and purchasers could be found who would agree, not only on sales by auction (*m*), but on private sales, to stipulations limiting the time for deducing title, giving the vendor the right to rescind in case of a disagreeable requisition, throwing upon the purchaser the expense of procuring all evidence of title not in the vendor's possession and

(*i*) *Re Marsh and Earl Granville*, 24 Ch. D. 11; above, pp. 34, 51.

(*j*) See *Phillips* v. *Caldeleugh*, L. R. 4 Q. B. 159; *Nottingham Patent Brick and Tile Co.* v. *Butler*, 16 Q. B. D. 778.

(*k*) *Rhodes* v. *Ibbetson*, 4 De G. M. & G. 787, 793.

(*l*) See 1 Bythewood & Jarman, Prec. Conv. 3rd ed. by Sweet (1841), pp. 490, 500; Sug. V. & P. 52, 1076, 11th ed. (1846).

(*m*) Above, p. 63, n. (*e*).

even of the concurrence in the conveyance of all necessary parties other than the vendor, and binding the purchaser to pay interest on delay in completion "from any cause whatever" (*n*). Then legislation took place, entirely in vendors' favour; and not only was the time for deducing title limited to forty years on open contracts (*o*), but the expense of procuring all evidence of title not in the vendor's possession was thrown on the purchaser in the absence of stipulation to the contrary (*p*). By this time the sale of land subject to special stipulations drawn entirely in the vendor's interest had become so much a matter of course that conveyancers engaged in settling contracts for sale on the purchaser's behalf had almost abandoned even the claim to protest (*q*). Recently, however, a change has again taken place. Judicial decisions upon the construction of the enactment making the purchaser pay for all evidence which the vendor has not, have shown that it may work most unfairly to the purchaser, who has been held liable to pay the expense of the production of title-deeds in the possession of the vendor's mortgagees (*r*), and of searching for a leading title-deed which was absent from the vendor's possession (*s*). It has also been shown that the contract to pay interest on delay in completion from any cause whatever (*t*) and the stipulation requiring the purchaser to pay the costs of getting in outstanding estates (*u*) may work great hardship on a purchaser. Owing to these decisions, it is thought that practitioners are again becoming sensible of the duties incumbent on them when acting for a pur-

(*n*) See Juridical Society Papers, ii. 589 *sq.*; Davidson, Prec. Conv. vol. ii. pt. i. 1-20, 4th ed. (1877).

(*o*) Stat. 37 & 38 Vict. c. 78, s. 1.

(*p*) Stat. 44 & 45 Vict. c. 41, s. 3 (6).

(*q*) See 1 Key & Elphinstone's Prec. Conv. 283, n., 2nd ed.; 348, n., 4th ed.; 316, n., 5th ed.

(*r*) *Re Willett and Argenti*, 5 Times L. R. 476.

(*s*) *Re Stuart, Olivant and Seadon's Contract*, 1896, 2 Ch. 328.

(*t*) See above, p. 56.

(*u*) *Re Willett and Argenti*, 5 Times L. R. 476.

chaser; and when on private sales vendors propose the same stipulations as they would make on a sale by auction, it is no longer a matter of course that the purchaser's advisers shall receive the proposal with supine acquiescence. Of course bargaining about the conditions of sale is like bargaining about the price. The ultimate decision depends on the willingness of one party to give in rather than lose the contract. But a purchaser has such good reason for objecting, on a private sale, to the conditions usual on sales by auction that it appears foolish to agree to them without negotiation. He is likely to succeed in some, if not all of his contentions; and even where he finds himself reduced to the alternative of withdrawing his objection or abandoning the purchase, he will often have extracted valuable information showing why the vendor refuses to give way, and helping him materially in exercising his own judgment.

Vendor's reasons for not desiring an open contract.

The main reasons why a vendor does not usually desire to sign an open contract are these:—he wants to obtain a deposit as a guarantee for the due performance of the contract; he probably does not want to make out the whole forty years' title as required by law; he desires above all to be able to rescind if a too onerous requisition be made; and he wants the time stipulation as to making requisitions (*v*) and the express contract to pay interest on delay from any cause whatever (*w*), in order to avoid the leisurely procedure sanctioned by the rule that time is not of the essence of the contract (*x*). But the purchaser has only one reason for avoiding an open contract, namely, the unfavourable position in which the law places him as regards the expenses of evidence not in the vendor's possession. In all other respects an open contract is

(*v*) Above, p. 51. (*w*) Above, p. 56. (*x*) Above, p. 47.

decidedly advantageous to him; he pays no deposit, can insist on a good forty years' title without fear that a necessary but unwelcome requisition will be met by a notice to rescind, can require the vendor to get in outstanding estates or incumbrances at his own expense, and need pay no interest on delay in completion caused by the state of the title or the vendor's fault (*y*). On the whole, it seems advisable for an intending purchaser always to offer, and if he can, to procure the signature of an open contract. If the vendor be anxious to sell and satisfied with the price proposed, such an offer will bring home to him the advantage of binding the purchaser definitely and at once instead of disputing over special stipulations, each of which gives the buyer an opportunity of retiring. And if the purchaser profess his willingness to sign an open contract from the first, he will occupy a favourable position for negotiating as to any special stipulations. I am willing, he may point out to the vendor, to buy under the conditions imposed by law; you wish to modify them. Be it so: but it is, to say the least, unfair that every special stipulation should be in your favour. If you expect to have the great advantages of receiving a deposit and being enabled to rescind on receiving an unwelcome requisition, advantages which you can only acquire by special stipulation, you must at least purchase them by relieving me from part of the expense now cast on me by law, and you must not expect me to contract to pay interest on delay caused by your fault.

Points to be considered in settling a private contract.

In settling a private contract then, the object of the draftsman acting for the vendor will usually be to obtain the insertion of the stipulations made on sales by auction: while the duty of a conveyancer acting on the purchaser's behalf is to oppose such provisions in

(*y*) See above, pp. 22, 28, 34, 38, 42.

all points where they can be shown to be unreasonable. We will now go through the clauses in detail.

Deposit.

The payment of a deposit is not an unreasonable requirement, and is usually demanded, unless the purchaser be a person of well-known solvency (*z*). Nor can such a requirement work unfairly to the purchaser, if the contract be in other respects an open contract; provided he be careful to stipulate for payment of the deposit to some responsible person as stakeholder, and not to the vendor himself or to his solicitor as his agent (*a*). But if it is proposed that the contract shall contain special stipulations as to title, a purchaser paying a deposit may find himself in this predicament, which is by no means uncommon:—the special condition may be considered in equity to be so unfairly drawn that the Court will not enforce specific performance at the vendor's suit without his complying with some requirement as to title, which is prohibited by the letter of the condition (*b*). The vendor may decline to do this; and the purchaser cannot force him to do it, because if the *purchaser* apply for specific performance, the vendor would not be bound to prove more than a good title according to the contract (*c*); and even if he failed to prove this, the purchaser would be obliged either to waive his objections to the title and pay the costs of the inquiry into title (*d*), or submit to have his application dismissed without costs (*e*). And if, in such circumstances, the purchaser seek to recover his deposit, he will fail, because that is a matter depending solely

(*z*) Davidson, Prec. Conv. vol. ii. pt. i. p. 4, 4th ed.

(*a*) See above, p. 23.

(*b*) Above, pp. 31, 32.

(*c*) *Re Banister, Broad* v. *Munton*, 12 Ch. D. 131, 145; *Lawrie* v. *Lees*, 14 Ch. D. 249; 7 App. Cas. 19.

(*d*) *Bennett* v. *Fowler*, 2 Beav. 302; Fry, Sp. Perf. § 1320, p. 590, 3rd ed.

(*e*) *Lewis* v. *Loxham*, 3 Mer. 429; *Malden* v. *Fyson*, 9 Beav. 347; Sug. V. & P. 646; 2 Dart, V. & P. 1263. In such case the purchaser could not recover his own costs as damages at law; *Malden* v. *Fyson*, 11 Q. B. 292.

on the effect of the contract at law. And the common law, not recognising the unfairness which in equity prevents the vendor from enforcing the contract specifically, will regard the purchaser repudiating the letter of the special condition as having broken the contract, and will not therefore aid him to recover the deposit (*f*). And if he complain of hardship, he will probably be told that he was a fool to buy land on special conditions as to title. These considerations ought to be present in the mind of a purchaser's adviser, when it is demanded that his client pay a deposit and yet submit to special conditions as to title; and he should endeavour, if he must give in to the demand, to yield only at the price of some substantial concession to himself, as that the abstract shall be verified free of all expense to the purchaser.

Time for completion.

It is a matter of course to fix a day for completion. A time should be allowed within which it is reasonably likely that all things preliminary to completion will be done. Too often the day for completion appears to be fixed at hazard, or without any expectation that completion shall really then take place.

Fixtures or timber at a valuation.

It is of course as necessary to stipulate expressly, that fixtures or timber shall be taken at a valuation, on a private sale as on a sale by auction (*g*).

Commencement of title.

A purchaser should, as a rule, resist the insertion in a sale by private contract of any special stipulations limiting the vendor's obligations in respect of showing title, and should only accept such provisions on condition of concession in other matters to himself. Thus if it be proposed that the abstract commence with a

(*f*) *Re National Provincial Bank of England and Marsh*, 1895, 1 Ch. 190; *Re Scott and Alvarez*, 1895, 2 Ch. 603; see above, pp. 31, 32.

(*g*) Above, p. 50.

deed less than forty years old, and that a deposit be paid, the purchaser should require the vendor to undertake expressly that the deed is a good root of title. This would, it is thought, save the purchaser from losing his deposit in circumstances such as those, which have just been discussed (*h*). And further concessions should certainly be demanded as the price of consent to any large curtailment of the time for which title is required to be shown by law; as that the vendor should bear the whole expense of verifying the abstract.

Limiting time for making requisitions or objections.

It is quite proper to provide in a private contract for sending in the purchaser's requisitions or objections within a limited time, to be of the essence of the contract (*i*). But the purchaser should take care that a reasonable time is allowed for perusal of the abstract by his counsel; and he should stipulate that the abstract be delivered within a specified time (*j*).

Reservation to vendor of right to rescind the contract.

It is usual to reserve to the vendor the right to rescind, if unable or unwilling to comply with some requisition, on which the purchaser insists (*k*). This is a stipulation which it is generally essential for the vendor to make. But as it is no part of an open contract and is entirely one-sided, the purchaser ought to make its acceptance a ground of securing some advantage for himself. And if he admit it, he should stipulate that it be qualified by providing that the right of rescission should only arise if the vendor have some reasonable ground, as the expense, for declining to comply with the requisition (*l*). He should also take care that the terms of the stipulation give him the

(*h*) Above, p. 69.

(*i*) Above, p. 51.

(*j*) See above, p. 52.

(*k*) Davidson, Prec. Conv. vol. ii. pt. i. p. 4, 4th ed.; see above, p. 54.

(*l*) See 1 Key & Elphinstone, Prec. Conv. 266, n. (*b*), 4th ed.; above, p. 54, n. (*n*).

alternative of withdrawing the unwelcome requisition (*m*).

Expense of verification of the abstract.

The purchaser ought to try to obtain some relaxation of his obligation to bear the expense of procuring and producing all evidence of title, which is not in the vendor's possession (*n*). He should ask, according to the vendor's eagerness to sell and the modifications of the contract proposed on the vendor's behalf, that the vendor shall bear either (1) the whole expense of verifying the abstract, or (2) such expenses of the production for verification of the abstract and the examination by the purchaser's solicitors of any documents, which the purchaser can require to be abstracted and which are in the possession of any other person than the vendor, as the vendor would be bound to pay if the said documents were in his own possession, or (3) the like expenses as to documents which can be required to be abstracted and are in the possession of a mortgagee or other incumbrancer. The last of these stipulations ought to be proposed on the purchaser's behalf on every treaty for a private sale (*o*).

Evidence of identity.

The purchaser should object to any stipulation limiting his right to require evidence of identity (*p*), and should certainly not agree, without good reason shown, to any stipulation more stringent in this respect than the common-form condition on sale by auction (*q*).

Compensation for errors of description.

As we have seen (*r*), an express stipulation, that compensation shall be paid for errors of description, is more

(*m*) See above, pp. 54, 60.

(*n*) Above, pp. 28, 37.

(*o*) Such a stipulation is contained in the common form conditions of sale by auction of the Bristol, Liverpool, and Newcastle-upon-Tyne Law Societies; and the Birmingham Law Society conditions are, as we have seen, even more favourable to the purchaser. Above, p. 63, n. (*d*).

(*p*) See Davidson, Prec. Conv. vol. ii. pt. i. pp. 4, 13-16.

(*q*) See above, pp. 28, 54, 60.

(*r*) Above, p. 55.

favourable to the purchaser than the terms of an open contract: whilst a condition, that no compensation shall be made for such errors, appears more advantageous to the vendor.

Conveyance.

A purchaser should certainly strike out of a draft contract any provision throwing upon him the expense of getting in any outstanding estate or perfecting the vendor's title, or of the concurrence in the conveyance of any necessary parties besides the vendor (*s*). In these respects he should stand out for the rights he would have under an open contract (*t*). This is only reasonable; and we have seen that, under the common-form conditions of the Birmingham and other law societies, purchasers on sales by auction are not deprived of these rights (*u*).

Apportionment of rents and outgoings.

The same provision is made on a private sale for apportionment of the rents and outgoings as on a sale by auction (*uu*).

Interest in case of delay in completion.

It is invariably asked that the purchaser shall expressly agree to pay interest on his purchase in case of delay in completion (*v*). But purchasers are advised to object to a stipulation binding them to pay interest on delay in completion arising "from any cause whatever" or "from any cause whatever other than the wilful default of the vendor" (*w*); not to agree to an excessive rate of interest, as 5*l.* per cent. under the present conditions of the money market; and to stipulate that, if delay in completion arise from the state of the title or any other cause except the purchaser's own fault,* he may discharge himself of his liability to pay interest by

(*s*) Above, pp. 56, 61.
(*t*) Above, p. 38.
(*u*) Above, p. 63, n. (*d*).
(*uu*) Above, pp. 56, 61.
(*v*) Davidson, Prec. Conv. vol. ii. pt. i. p. 4, 4th ed.: 1 Key & Elphinstone, Prec. Conv. 259, 351, 4th ed.
(*w*) See above, p. 56.

* see Re Bayley-Worthington & Holmes' contract, 100 L.T.R. 650 (1909)

duly appropriating his money to the purchase. Such a stipulation is, as we have seen (*x*), contained in the common-form conditions of sale by auction of the Birmingham, Bristol, Liverpool and Manchester Law Societies.

Re-sale.

A stipulation reserving to the vendor the right of re-sale on any breach of contract by the purchaser appears in well-known books of conveyancing precedents among the provisions usual in private sales (*y*). But there is certainly no settled practice to include such a condition in a private contract; and if it be inserted on the vendor's behalf, the purchaser's advisers are recommended to strike it out.

A form of private contract for sale will be found in the Appendix.

(*x*) Above, p. 63, n. (*d*).

(*y*) Davidson, Prec. Conv. vol. ii. pt. i. p. 4, 4th ed.; 1 Key & Elphinstone, Prec. Conv. 268, 351, 4th ed.; 242, 319, 5th ed.

CHAPTER IV.

OF THE VENDOR'S OBLIGATION TO SHOW A GOOD TITLE AND ITS DISCHARGE.

§ 1. Of the general nature of the proof required.
§ 2. Of the abstract.
§ 3. Of the verification of the abstract.

---

§ 1.—*Of the vendor's obligation to show a good title and its discharge.*

Origin of the rule, that the vendor must show a good title.

We have seen (*a*) that every vendor of land is bound to show a good title to the property sold by him. This rule would appear to be of equitable origin. The Courts of Equity, in granting to a vendor the extraordinary relief of enforcing specific performance of the contract, considered that it was only fair to impose the condition, that he on his side should prove that he could actually convey what he professed to sell (*b*). And the obligation so established in equity was afterwards held to be equally incident to the contract at law (*c*). What the vendor has to prove, in order to fulfil this obligation, is that he can convey that which he contracted to sell; that is to say, if he engaged to sell a freehold or copyhold in fee (*d*), the fee simple free from incumbrances, or

(*a*) Ante, p. 27.

(*b*) *Jenkins* v. *Hiles*, 6 Ves. 646, 653; *White* v. *Foljambe*, 11 Ves. 337; *Deverell* v. *Bolton*, 18 Ves. 508; *Fildes* v. *Hooker*, 2 Mer. 424; *Purvis* v. *Rayer*, 9 Price, 488, 518, 519.

(*c*) *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Souter* v. *Drake*, 5 B. & Ad. 992; *Doe* d. *Gray* v. *Stanion*, 1 M. & W. 695, 701. This rule had no place in the mediæval common law, when feoffees looked mainly to their feoffors' warranty for their security; see Wms. Real Prop. pt. v. pp. 548-51, 18th ed.

(*d*) As we have seen, a con-

Proof of sixty years' title *primâ facie* proof of a good title.

if the property sold were leasehold, then the term for which he described it as held. But the nature and extent of the proof required was defined by a general rule of equity and law, adopted from the practice of conveyancers, whereby proof of title for not less than sixty years before the contract was held to be proof of a good title, if nothing appeared to the contrary (*e*). It is important to bear in mind, however, that this was merely a subordinate rule limiting the amount of evidence which the purchaser could require. It simply bound the purchaser to accept, as proof of a good title, evidence of sixty years' ownership ending in the vendor or in some person or persons whom the vendor would have the right to direct to convey; provided, however, that nothing appeared to show that the ownership so proved was not full or complete. But it was of no avail to show sixty years' title, if the result of the evidence produced were not to discharge the vendor's main obligation, that is, to prove that he could actually convey what he sold (*f*). Thus on the sale of a freehold in fee, if it were proved that the vendor and his predecessors had had possession and exercised acts of ownership for sixty years back, that would no doubt be *primâ facie* evidence of a seisin in fee, and the purchaser would be bound to accept the title (*g*). But supposing it appeared from the vendor's evidence, or the purchaser could prove from other sources that such possession and ownership were enjoyed under a demise for a long

tract to sell a piece of land, without specifying what estate therein is to be conveyed, is construed as a contract to sell the whole estate therein, that is, in the absence of any limiting expressions, the unincumbered freehold in fee; above, p. 34.

(*e*) *Barnwell* v. *Harris*, 1 Taunt. 430, 432; *Cooper* v. *Emery*, 1 Ph. 388; *Hodgkinson* v. *Cooper*, 9 Beav. 304; *Moulton* v. *Edmonds*, 1 De G. F. & J. 246; Sug. V. & P. 365, 407.

(*f*) See Sug. V. & P. 366; *Frend* v. *Buckley*, L. R. 5 Q. B. 213.

(*g*) See *Prosser* v. *Watts*, 6 Madd. 59; *Cottrell* v. *Watkins*, 1 Beav. 361, 365, 366; *Parr* v. *Lovegrove*, 4 Drew. 170, 177, 178; *Moulton* v. *Edmonds*, 1 De G. F. & J. 246.

term of years, it is obvious that the evidence of sixty years' title would not prove that the vendor could convey the fee simple which he sold. The purchaser therefore could require further evidence of the vendor's title to the fee simple, and if this were not forthcoming, would have the right to rescind the contract. It seems worth while to insist on this apparently simple distinction between the main rule imposing the duty of showing a good title, that is, a title to convey what was sold (*h*), and the subordinate rule defining the manner of proof. As a matter of fact, omission to remember this distinction has been a fruitful source of error, especially in cases where *the time* for which title can be required to be shown has been limited by special stipulation. In some such cases, the vendors, or their advisers, would appear to have forgotten that such a stipulation merely limits the evidence of title that can be asked of them in the first instance, and does not exempt them from the general duty of proving that they have the right to convey what they have sold (*i*).

Sixty years' title had to be shown, as a rule, in all cases.

A good title then is shown by proving such ownership as is promised by the contract; and the evidence required is evidence of the exercise of acts of ownership for a period of time which, in the absence of special stipulation, was fixed at not less than sixty years. The rule requiring evidence of sixty years' ownership in proof of title applied equally to a sale of freeholds, whether of inheritance or for lives, copyholds and leaseholds for years (*j*). In the case of leaseholds, if the lease were less than sixty years old, the vendor might

(*h*) *Lawrie* v. *Lees*, 7 App. Cas. 19.

(*i*) See *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159; *Waddell* v. *Wolfe*, L. R. 9 Q. B. 515; *Nottingham Patent Brick and Tile Co.* v. *Butler*, 15 Q. B. D. 261, 271; 16 Q. B. D. 778.

(*j*) *Barnwell* v. *Harris*, 1 Taunt. 430; *Cooper* v. *Emery*, 1 Ph. 388; *Hodgkinson* v. *Cooper*, 9 Beav. 304; *Moulton* v. *Edmonds*, 1 De G. F. & J. 246; Sug. V. & P. 365, 407.

be required to show the title to the freehold for such a period as, with the time expired since the grant of the lease, would make up sixty years (*k*). There were, however, certain cases in which the purchaser could call for earlier title than that of the last sixty years. These were the following:—

When earlier title could be required.

1. Advowson.

(1.) Not less than one hundred years' title must have been shown to an advowson (*l*).

2. Long term.

(2.) Upon a sale of a long term of years, the lease must have been produced, although more than sixty years old. But after the date of the lease the title during the sixty years next before the date of the contract for sale was all that could be required (*m*).

3. Tithes or property held by Crown grant.

(3.) Upon a sale of tithes or other property held under a grant from the Crown, the original grant must have been shown, although more than sixty years old. After the date of the grant, only sixty years' title prior to the contract need have been shown. The intermediate title could not be required (*n*).

4. Reversionary interest.

(4.) Upon the sale of a reversionary interest, its creation must have been shown, whatever its antiquity (*o*).

All these instances do but illustrate the point on

(*k*) *Purvis* v. *Rayer*, 9 Price, 488; *Souter* v. *Drake*, 5 B. & Ad. 992. It also applied to a contract to grant a lease, whether for lives or years, such a contract being regarded as equivalent to a sale for the time the lease was to run; *Roper* v. *Coombes*, 6 B. & C. 534; Sug. V. & P. 367, n. (1); *Stranks* v. *St. John*, L. R. 2 C. P. 376.

(*l*) Sug. V. & P. 367; 1 Dart, V. & P. 293, 5th ed.; 334, 6th ed.; Wms. Real Prop. 449, 13th ed.

(*m*) Sug. V. & P. 370; *Frend* v. *Buckley*, L. R. 5 Q. B. 213; 1 Dart, V. & P. 294, 5th ed.; 335, 6th edit.; Wms. Real Prop. 450, 13th ed.

(*n*) *Pickering* v. *Lord Sherborne*, 1 Craw. & Dix, 254; 1 Prest. Abst. 30, 2nd ed.; 1 Jarm. Conv. by Sweet, 68; Sug. V. & P. 367; 1 Dart, V. & P. 295, 5th ed.; 336, 6th ed.

(*o*) 1 Prest. Abst. 19, 2nd ed.; 1 Jarm. Conv. by Sweet, 61; 1 Dart, V. & P. 294, 5th ed.; 335, 6th ed.

which we have been insisting, that the vendor's obligation is to show that he has the right to convey what he sold, and unless the evidence offered in support of the title prove this, it is insufficient, though it were evidence of sixty years' ownership. The case of a sale of leaseholds is particularly instructive. On the ground that a purchaser of leaseholds was entitled equally with a purchaser of freeholds to the assurance that he should have the very thing he bought, it was held that the vendor was bound to produce the freeholder's title to grant the lease, if the lease were less than sixty years old (*p*). But if the lease had been granted more than sixty years before the sale, proof of sixty years' enjoyment under the lease would establish the presumption that it had been well granted, and in such case the freeholder's title could not be called for; although the lease itself must have been produced, in order to prove that the vendor could assign the very interest which he had sold (*q*). The other cases will be found to depend on similar principles.

Vendor and Purchaser Act, 1874.

Forty years' title only now required.

The law being as above stated, it was enacted in the Vendor and Purchaser Act, 1874 (*r*), that in the completion of any contract of sale of land (*s*) made after the 31st day of December, 1874, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty

(*p*) See cases cited ante, p. 78, n. (*k*).

(*q*) Ante, p. 78.

(*r*) Stat. 37 & 38 Vict. c. 78, s. 1.

(*s*) By the Interpretation Act, 1889 (Stat. 52 & 53 Vict. c. 63, s. 3, replacing 13 & 14 Vict. c. 21, s. 4), in every Act passed after the year 1850 the expression "land" shall, unless the contrary intention appears, include messuages, tenements, hereditaments, houses and buildings of any tenure.

years may now be required. This enactment in no way detracts from the main rule that the vendor must show a good title; it merely reduces the time, for which title must, as a rule, be proved, from sixty to forty years.

Other restrictions on purchaser's rights.

By the same Act (*s*), the purchaser of a term of years was deprived of the right to call for the title to the freehold, in the absence of stipulation to the contrary; and by the Conveyancing Act of 1881 (*t*) the purchaser of a term granted by underlease was deprived of the right (unless expressly reserved) to call for the title to the leasehold reversion. The latter Act also took away from the purchaser of land, once of copyhold or customary tenure but converted into freehold by enfranchisement, the right (except by express agreement) to call for the title to make the enfranchisement (*u*). We have seen that a purchaser of leaseholds was entitled to call for the production of the lessor's title on the ground that the validity of a lease depends on the lessor's power to grant it (*v*). And where enfranchisement has been effected by the lord's conveyance of the freehold to the tenant, it is obviously material to prove the title to make the enfranchisement in order to establish a good right to the land (*w*). But before the above-mentioned enactments were passed purchasers frequently submitted in practice to special stipulations of the like nature (*x*), which seems to be the reason why these statutory provisions were made.

(*s*) Stat. 37 & 38 Vict. c. 78, s. 2, r. 1.

(*t*) Stat. 44 & 45 Vict. c. 41, s. 3 (1), (9).

(*u*) Sect. 3 (2), (9).

(*v*) Ante, p. 79.

(*w*) Sug. V. & P. 372; 1 Dart, V. & P. 289, 5th ed. Enfranchisement under the Copyhold Acts, 1841, 1852, or 1894, makes the land freehold, irrespectively of the validity of the lord's title; which is therefore immaterial and cannot be inquired into on a sale of the land after such enfranchisement; see Stat. 4 & 5 Vict. c. 35, s. 64; *Kerr* v. *Pawson*, 25 Beav. 394; 1 Dart, V. & P. 166, 290, 5th ed.; 189, 330, 6th ed.; Stat. 57 & 58 Vict. c. 46, ss. 21, 26 (3), (4), 38, 61.

(*x*) 1 Dav. Prec. Conv. 531, 623, n. (*y*), 4th ed.; 1 Dart, V. & P. 166-68, 5th ed.; Wms. Real Prop. 452, 13th ed.

The present law.

The present law therefore is this:—The vendor is bound to show a good title, that is, he must prove that he has the right to convey what he sold. In some exceptional cases he may be able to offer summary and complete proof of this, as where a title, good against all the world, is vested in him by Act of Parliament (*y*). But, as a rule, he will have no alternative but to give evidence of the ownership of himself and his predecessors for a certain time back. This time, in the absence of special stipulation, must be not less than forty years: but this general rule is modified by the considerations and enactments already stated (*z*). A purchaser under an open contract is therefore entitled to call for the title mentioned below in the following cases of sale:—

1. Freeholds or copyholds.

1. Of freeholds of inheritance or for lives, or copyholds, title for forty years next before the contract (*a*). In the case of freeholds for lives, the lease for the lives must be produced, though more than forty years old.

2. Enfranchised copyholds.

2. Of freeholds, formerly copyhold but enfranchised within forty years of the sale, the freehold title back to and including the enfranchisement, and beyond that the copyhold title back to forty years before the contract (*b*), but not the title to make the enfranchisement (*c*).

3. Leaseholds.

3. Of leaseholds, production of the lease under which the property is held in all cases; and, if the lease be more than forty years old, the title under the lease for the forty years next before the contract, otherwise the whole title subsequent to the lease: but not in any case the title to the freehold, nor, in the case of the sale of property held by underlease (*d*), the title to any

(*y*) This might be by special Act of Parliament, and appears to be the case with persons registered as owners with an indefeasible title under the Land Registry Act, 1862 (Stat. 25 & 26 Vict. c. 52, s. 20), or with an absolute title under the Land Transfer Act, 1875 (Stat. 38 & 39 Vict. c. 87, s. 7); see 1 Dart, V. & P. 347; Land Transfer Act, 1897 (Stat. 60 & 61 Vict. c. 65, s. 16).

(*z*) Ante, pp. 76—80.

(*a*) Ante, pp. 76, 79.

(*b*) Sug. V. & P. 372; 1 Dart, V. & P. 289, 5th ed.

(*c*) Ante, p. 80, and n. (*w*).

(*d*) Ante, pp. 78, 80. Here it may be noted that, if property

Contract to grant a lease for years.

leasehold reversion (*e*). Here we may remark that the same law applies on a contract to grant a lease for years (*f*), the intended lessee being precluded, in the absence of stipulation to the contrary, by the Vendor and Purchaser Act, 1874 (*g*), from calling for the title to the freehold, and by the Conveyancing Act of 1881 (*h*) from calling for the title to any leasehold reversion to the intending lessor's interest. But on a contract to grant an underlease, the intending lessor still remains liable to produce the lease under which he holds, and to show the subsequent title thereunder, if it be less than forty years old, otherwise the last forty years' title thereunder.

4. Advowson.

4. Of an advowson, title for at least one hundred years before the contract (*i*).

5. Tithes, or property held by Crown grant.

5. Of tithes or other property held under a grant from the Crown, production of the original grant in all cases, and title thereunder for the forty years next before the contract (*j*).

6. Reversionary interest.

6. Of a reversionary interest, production of the instrument which created it, in all cases; and in addition proof that possession of the land has been in accordance with the instrument so produced (*k*). If the reversionary interest were created less than forty years before the contract, of course the whole title subsequent to its creation must be shown. In other cases it would appear to depend on the nature of the interest sold what title ought to be shown subsequently

sold be described as held by lease, that is intended to mean a lease from the freeholder, so that if the vendor be possessed only of a term granted by underlease, he is not in a position to fulfil the contract; *Re Beyfus and Masters's Contract*, 39 Ch. D. 110.

(*e*) *Gosling* v. *Woolf*, 1893, 1 Q. B. 39.

(*f*) Above, p. 78, n. (*k*).

(*g*) Stat. 37 & 38 Vict. c. 78, s. 2, r. 1; *Jones* v. *Watts*, 43 Ch. D. 574.

(*h*) Stat. 44 & 45 Vict. c. 41, s. 13.

(*i*) 1 Dart, V. & P. 293, 5th ed.; 334, 6th ed.; Wms. Real Prop. 451, 13th ed.

(*j*) 1 Dart, V. & P. 295, 5th ed.; 336, 6th ed.

(*k*) 1 Jarm. Conv. 3rd ed. by Sweet, 61, 62; 1 Dart, V. & P. 294, 5th ed.; 335, 6th ed.

to its creation. If the property sold were a reversion or remainder to which any rent is incident, then the purchaser could call for production of the last forty years' title, but not the intermediate title. For in such a case there is a perception of tangible profits by receipt of rent, and this affords evidence of title as against not only the rent-payer but others as well. If however what was sold were a bare right, the apparent devolution thereof to particular persons for the last forty years can raise no presumption of the establishment of a right superior to the claims of others. In this case therefore there seems to be no good reason for putting any time-limit to the required proof that the vendor has the right to convey what he sold; and it is thought that the whole title, from the creation of the reversionary interest to the contract for sale, can be called for.

The best and the usual evidence of title is production of the title-deeds.

At the present time then, the vendor, in order to show a good title to the property sold, has, as a rule, to give evidence of the last forty years' ownership thereof, and to make out that such ownership ends either in himself or in some person or persons whom he is entitled, either unconditionally or upon certain conditions of which the performance rests with himself alone (such as the payment off of mortgages) to direct to convey. Now, as some of the best evidence of ownership is proof of the power of disposition incident to ownership, especially for valuable consideration (*l*), and as proof that the vendor has the right to convey what he sold must necessarily be made out by showing the devolution of the ownership of the land, it usually happens that the main evidence offered in support of the vendor's title is the deeds, by which the land sold has been conveyed on former sales or mortgages thereof, and any will, by which the land may have been devised. Thus the chief

(*l*) See Burt. Comp. pl. 418-427.

evidence of title given on sales is almost entirely documentary. This results of course from the fact that ever since the end of the mediæval period of law, the usual method of making a conveyance of land has been by the execution of deeds or a deed (*m*). If then, on the sale of a freehold in fee, the vendor produce the title-deeds for the last forty years, and these show that the fee simple in the land sold has been conveyed to him, free from incumbrances, and if there be satisfactory evidence that the deeds produced relate to the land sold, and the vendor be in possession of the land and of the deeds, he has shown a good title to the land. But although title deeds are the most common and, owing to the long prevailing custom of conveyance by deed, the best evidence of title, it must not be supposed that they are the only evidence which the purchaser is bound to accept. This will appear clearly if we bear in mind our main rule, that what the vendor has to show is that he has the right to convey what he sold, and our subordinate rule, that, if nothing appear to the contrary, this shall be taken to be shown on proof of forty years' ownership, that is, in the case of freeholds, forty years' seisin in fee, ending in the vendor. Now forty years' seisin in fee may be proved without deed; as by evidence of the seisin of some ancestor of the vendor forty years ago, and of devolution of the title to the vendor by descent. And if the facts of possession and kinship on which such a title must depend, were fully proved, the purchaser would be bound to accept it (*n*). But to illustrate the above rules further, it may be observed that the vendor of a freehold in fee would scarcely discharge his obligation to show a good title by simply proving that he himself had been in pos-

Other evidence of title

(*m*) See Wms. Real Prop. 141, 193 *sq.*, 18th ed.

(*n*) *Cottrell* v. *Watkins*, 1 Beav. 361, 365, 366; *Dorling* v. *Claydon*, 1 H. & M. 402; Sug. V. & P. 410, 421; 2 Prest. Abst. 23, 2nd ed.; 1 Dart, V. & P. 298, 336, 5th ed.; 340, 380, 381, 6th ed.

session of the land sold for forty years. For although the rule applicable in actions for the recovery of land is that possession is *primâ facie* evidence of a seisin in fee (*o*), it is considered that, on sales, the purchaser is entitled to better proof, that the vendor has the right to convey what he sold, than is afforded by facts equally consistent with his being entitled for life or years only as with his having the entire fee simple (*p*). In such a case therefore it is thought that the purchaser could require the vendor to show the origin of his possession, and to establish that he entered as tenant in fee, for instance, under a conveyance on sale to him, or as heir, or upon a wrongful entry (*q*).

Title depending on Statute of Limitations.

Here it may be noticed that the Court will compel a purchaser to take a title depending on the Statute of Limitations, that is to say, depending on the extinguishment under that Statute (*r*) of the right and title of some person or persons who are shown to have been rightfully entitled (*s*). But it must not be supposed that this doctrine enables a vendor, who has been in possession for twelve or even thirty years to escape the common obligation of showing forty years' title as proof of a good title.* Possession for these periods does not give a good title under the Statute as against all the world; it does not bar the rights of remaindermen or reversioners not entitled to possession until the determination of some particular estate (*t*). It does not appear therefore that a vendor's obligation of showing a good

(*o*) *Doe* d. *Hall* v. *Penfold*, 8 C. & P. 536; Cole on Ejectment, 211.

(*p*) See *Hiern* v. *Mill*, 13 Ves. 114, 122; *Eyton* v. *Dicken*, 4 Pri. 303; *Cottrell* v. *Watkins*, 1 Beav. 361, 365, 366; Sug. V. & P. 461; 1 Dart, V. & P. 379.

(*q*) See Co. Litt. 189 b, and n. (7); *Leach* v. *Jay*, 9 Ch. D. 44.

(*r*) Stat. 3 & 4 Will. IV. c. 27, s. 34.

(*s*) *Scott* v. *Nixon*, 3 Dru. & War. 388; *Games* v. *Bonnor*, 54 L. J. Ch. 517; 33 W. R. 388.

(*t*) Stat. 37 & 38 Vict. c. 57, ss. 1-5; *Pedder* v. *Hunt*, 18 Q. B. D. 565; *Re Earl of Devon's Settled Estates*, 1896, 2 Ch. 562.

* See Nisbet & Potts Cont., 1905, 1 Ch. 391, 401.

title can be discharged by proof of thirty or even forty years' possession by himself alone, without showing, if the Statute of Limitations be relied on, who were rightfully entitled and that the vendor's possession has effectually barred their claims (*t*).

Vendor must produce the title-deeds, if he can.

A good title then may be shown without deed. But the deeds are the best evidence of title; and if the land sold has been conveyed by deed within the period for which title has to be shown, it is not open to the vendor to prove forty years' seisin in fee by other means. He must produce the deeds, or if they be lost or destroyed, give proper secondary evidence of their contents (*u*).

§ 2. *Of the Abstract of Title.*

Vendor bound to make and deliver an abstract of title.

Evidence of title on sales being for the most part documentary (*v*), and such as can be weighed only by skilled legal advisers, it became usual to facilitate the task of judging of the effect of the title-deeds by making an abstract of their contents for the perusal of the purchaser's counsel. It appears that formerly the deeds were handed over to the purchaser for examination, and any abstract of them which he might require was made at his expense. But afterwards it became established that the vendor was bound to make at his own expense and deliver to the purchaser an abstract of the title to the property sold (*w*); and so the law still remains (*x*).

What the abstract ought to contain.

Speaking generally, the abstract of title ought to contain a statement of the material parts of every deed, will or other instrument, by which any dis-

(*t*) *Jacobs* v. *Revell*, 1900, 2 Ch. 858.

(*u*) *Bryant* v. *Busk*, 4 Russ. 1; *Moulton* v. *Edmonds*, 1 De G. F. & J. 246.

(*v*) Ante, p. 84.

(*w*) Sug. V. & P. 406.

(*x*) It has not been altered by sect. 3 (6) of the Conveyancing Act of 1881; *Re Johnson and Tustin*, 30 Ch. D. 42.

position of the property was made during the time for which title has to be shown; it ought also to contain a statement of every birth, death, marriage, bankruptcy or other event material to the devolution during the same period of the estate contracted to be sold (*y*). If the earliest piece of evidence stated on the abstract be an instrument of disposition, and this be offered in unsupported proof of the commencement of the vendor's title, it must be what is called a good root of title; that is to say, it must be an instrument of disposition dealing with or proving on the face of it (without the aid of extrinsic evidence) the ownership of the whole legal and equitable estate in the property sold, containing a description by which the property can be identified, and showing nothing to cast any doubt on the title of the disposing parties. If the instrument be deficient in any of these particulars, the purchaser may require further evidence to supply the deficiency (*z*). For example, if the abstract commence with a will containing a general devise of the testator's real estate, under which the property sold is alleged to have passed, the purchaser will be entitled to require evidence of the testator's seisin (*a*). But a conveyance in fee on a sale or by way of mortgage is a good root of title.

The abstract should commence with a good root of title.

The necessity for a good root of title is explained by referring to the rule that a good title is shown by proof of forty years' title. This means forty years' title to the whole estate sold; so that if the fee be sold, what the vendor has to prove is forty years' seisin in fee. He must therefore begin by proving a seisin in fee by himself or his predecessor of the property sold forty years before the contract, and end by showing a like seisin at the present time in himself or some person whose conveyance of the property he has a right to pro-

Reason of the rule requiring a good root of title.

(*y*) Sug. V. & P. 405 *sq.*; 1 Dart, V. & P. 319 *sq.*

(*z*) 1 Dart, V. & P. 295 *sq.*, 5th ed.; 337 *sq.*, 6th ed.

(*a*) *Parr* v. *Lovegrove*, 4 Drew. 170.

cure (*b*). It is accordingly equally incumbent on him to produce good evidence of the possession of the whole estate contracted for at the time of the commencement of title as to show that this estate is now his to convey. This is the reason why further evidence may be required by the purchaser, if the first document on the abstract be insufficient of itself to prove the ownership of the whole estate. Considered with regard to this principle, the conveyance of an equity of redemption and a lease for years, even though it be a demise by way of mortgage for a long term, obviously fall short of the requirements of a good root of title. So a deed appointing an estate under a power of appointment is not of itself a good root of title; as to have a power of appointment over an estate is not the same as to be the owner of it, and what a vendor has to prove is the full ownership, at the time of commencement of title, of the estate he is selling. For evidence of such ownership he must go back to the deed, which created the power (*c*). On the same principle, a disentailing assurance is not a good root of title; as it only shows the ownership of an estate tail at the time of commencement of title, and this, like a power of appointment, is merely a derivative interest and not full ownership, which is fee simple. In such cases, the deed creating the estate tail should be abstracted (*d*).

(*b*) Ante, p. 83.

(*c*) 1 Jarm. Conv. 3rd ed. by Sweet, 67; 1 Dart, V. & P. 297, 5th ed.; 339, 6th ed. By the Conveyancing Act, 1881 (Stat. 44 & 45 Vict. c. 41, s. 3 (3)), a purchaser of any property shall not require the production or any abstract or copy of any document dated or made before the time prescribed by law or stipulated for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser. But as, by sect. 3 (11), this provision is to be treated, for the purpose of the specific performance of the contract, like an express stipulation to the same effect, it follows, according to the principle laid down in *Re Marsh and Earl Granville*, 24 Ch. D. 11, that, unless a vendor fairly and explicitly stipulates that the abstract shall commence with a deed exercising a power, he cannot take advantage of this enactment in enforcing specific performance against the purchaser.

(*d*) 1 Prest. Abst. 5-7; Sug.

Whether the abstract must commence with a conveyance for valuable consideration.

It is of course advisable for a vendor to commence his abstract with a conveyance for valuable consideration, as that affords the strongest evidence of ownership, not only because it shows that someone was willing to give money for the property, but also on account of the presumption that on a sale or mortgage the prior title was investigated in the usual way and was approved. It does not appear however that a purchaser can object to an instrument of disposition forty years old as a root of title on the ground that the disposition was not made for valuable consideration or was made on an occasion on which it is not usual to investigate the title. Thus it seems that a voluntary conveyance (*e*), a specific devise or a family settlement would be an unobjectionable root of title, if made by deed or will forty years old; although in such cases the most prudent course for the vendor would undoubtedly be to specify in the contract or conditions of sale the nature of the instrument with which the title was to commence. But if the vendor make a special stipulation limiting the time for which title shall be shown to a shorter period than is given by law, different considerations apply. Such a stipulation must be fair and explicit, or the vendor, in seeking specific performance, will not be allowed to insist on it. If therefore a stipulation be made that the title shall commence with a particular deed less than forty years old, the purchaser is entitled to assume that the deed was made on an occasion on which the title would be investigated; and should this not be the case, as if the deed were voluntary, the vendor cannot force him, in an action for specific performance, to accept the title as limited by

Root of title where the time for showing title is curtailed by special stipulation.

V. & P. 366; 1 Dart, V. & P. 339.

(*e*) Cotton, L. J., *Re Marsh and Earl Granville*, 24 Ch. D. 11, 24. The contrary is stated by the editors of Dart, V. & P. i. 339, 6th ed., relying on the decision in the above case: but it is submitted that this decision goes no further than is stated below, and has no application, where the purchaser's rights are not curtailed by special stipulation.

the condition (*f*). Such conditions, to be effectual as regards the specific performance of the contract, must state clearly the nature of the instrument, with which the title is to commence.

What documents should be abstracted after the root of title.

After the document forming the root or commencement of title, there should be abstracted every subsequent document, whether deed or will, which deals with the legal estate in the property sold, except expired leases (*g*); and all facts whereon the title depends, such as births, marriages, deaths or bankruptcies, should be stated in their proper order. With regard to documents affecting the equitable but not the legal estate in the property sold, if they be documents on which the purchaser's title will necessarily depend, they certainly ought to be placed on the abstract (*h*). But as a purchaser for value, who takes a conveyance of the legal estate in any property, is not bound by any equitable interests therein, of which he has no notice, it is obvious that there may be many documents creating equitable interests only which are not necessary to the purchaser's title, so long as he obtains the legal estate without notice of them. For instance, the vendor may be possessed of documents showing that some former owner who appeared on the face of a conveyance to be entitled for his own benefit, was in fact a trustee, or that persons who had advanced money on mortgage were trustees of the mortgage money. In such cases it would be unusual to allow notice of the trust to appear on the abstract (*i*). This, Mr. Dart points out, is no doubt a departure from the general principle that it is for the purchaser's solicitor, and not the vendor's, to judge of the materiality of the muniments of title; but it is sanctioned by con-

(*f*) *Re Marsh and Earl Granville*, 24 Ch. D. 11.

(*g*) And except as mentioned above, pp. 81—83; 1 Dart, V & P. 340; and consider *Whiting to Loomes*, 14 Ch. D. 822; 17 Ch. D. 10.

(*h*) 1 Dart, V. & P. 341.

(*i*) 1 Dart, V. & P. 341, 342.

venience and universal practice (*j*). Again, if a charge should have been created on the property by a document which could only create an equitable interest therein, and the charge should afterwards have been paid off, it is not the practice to let these facts appear on the abstract (*k*). This is contrary to the rule laid down by Wood, V.-C., in *Drummond* v. *Tracy* (*kk*), who stated that he had no doubt that such charges ought to be communicated to the purchaser. It was observed, however, by Mr. Dart (*l*), that the strict rule so laid down may be theoretically correct: but its practical inconvenience, as much to purchasers as vendors, is so great, that in practice it had previously been all but universally ignored: nor has the practice, it is believed, been materially, if at all, affected by that decision.

The general rule then as to what documents ought to be abstracted is that laid down by Lord St. Leonards (*m*) :—"The solicitor should abstract every document upon which the title depends, or upon which any difficulty has arisen. Wherever he begins the root of title, he ought to abstract *every* subsequent deed." This general rule is however qualified, as we have seen, by the practice of not disclosing trusts such as the trusts of money advanced by trustees on mortgage, or of purchases where the trustee appears on the face of the conveyance to be entitled for his own benefit; and by the practice of not abstracting merely equitable charges which have been paid off. There is a difference however between equitable charges which may and those which cannot affect the legal estate. A mortgage of an equity of redemption, or second mortgage, made by deed, with a proviso for redemption in the same form

(*j*) See *Re Harman and Uxbridge, &c. Ry. Co.*, 24 Ch. D. 720.
(*k*) 1 Dart, V. & P. 343.
(*kk*) John. 608, 612.
(*l*) Ibid.
(*m*) Sug. V. & P. 407.

as a legal mortgage, could operate to convey the legal estate if it should not have passed by the prior mortgage. Such a charge, Mr. Dart pointed out (*n*), should rarely or never be suppressed. Equitable charges created by a mere memorandum in writing or by deposit of title-deeds stand on a different footing; for without a deed the legal estate in lands cannot be affected by such charges. In spite of the rule to the contrary laid down in *Drummond* v. *Tracy* (*o*), it is the practice to make no mention of such charges in the abstract after they have been paid off; nor are they generally disclosed, even when still subsisting (*p*).

The manner of making an abstract.

Some few words should be said about the manner in which deeds or other documents should be abstracted. At the present day, the work of making an abstract of title is often so indifferently performed that it seems necessary to point out that the vendor is bound to furnish such an abstract of the contents of the deeds as shall enable the purchaser's counsel to judge of their effect. The purchaser cannot therefore be required to accept as a proper abstract any mere statement of the effect of any operative clause, which is material to the title; he is entitled to be informed of the exact words used in every material part of any document abstracted. For the whole object of requiring an abstract of title is to enable the purchaser's conveyancing counsel to examine the title in a convenient way (*q*); the abstract is all he sees; and if the very words used are not placed before him, it is impossible for him to exercise his judgment on the title. And counsel should not accept a mere statement of the effect of a material clause provisionally, subject to the statement proving to be correct; for this is to delegate the determination of a matter, to

(*n*) 1 Dart, V. & P. 342.
(*o*) John. 608.
(*p*) 1 Dart, V. & P. 342-344.
(*q*) Ante, p. 86.

which he ought to apply his own judgment, to the discretion of the gentleman, who examines the abstract with the deeds (*r*). The general rule then is that the exact words of all material clauses should appear in the abstract. The material clauses are those which have taken effect upon the estate, to which the title is being shown. Thus in deeds of conveyance, the names and descriptions of the parties, the recitals, which show their intention, the testatum with its statement of the consideration and operative words, the parcels, the habendum, and the declaration of uses or of trusts, if any, are all material to the conveyance of the estate and should be fully abstracted. Of covenants for title, however, it is, as a rule, sufficient to know that they were entered into in the usual way. If therefore such covenants have been given at large in the common forms in use before the year 1882, it is enough to state their effect. When covenants for title have been incorporated in deeds under the Conveyancing Act of 1881 by the use of the proper statutory expressions, these expressions should of course be abstracted *verbatim*. So all powers which are exercised by any abstracted document should be fully abstracted: but it is sufficient simply to refer to powers which have not been exercised. The same considerations apply to the abstracting of any provisoes which may abridge or affect the estate limited. Shifting clauses, for instance, should be fully abstracted, if they have come into operation; if not, they need only be mentioned with a statement of the events in which they were intended to operate. Joint account clauses ought to be fully abstracted, if they have taken effect. And a proviso for reconveyance should always be so abstracted as to show the charge created, the terms of redemption, and to whom the reconveyance is to be made (*s*). All documents material to the title should be abstracted in

(*r*) See 1 Prest. Abst. 116, 117, 2nd ed.
(*s*) Ibid. 147-153; Sug. V. & P. 407-410; and see Ch. V., below.

chief, notwithstanding that they may be fully recited in some subsequent instrument (*t*): but if this be done, the subsequent recital need not of course be set out at large; it will be sufficient to refer to the recited document as "hereinbefore abstracted."

Execution of deeds, &c. should be stated.

The abstract should always state what parties to any title-deed executed the same and whether such execution was attested; and in the case of documents which are invalid unless attested by some particular number of witnesses or executed with some other special formality, such as wills (*u*), or deeds exercising powers required to be exercised with some special formality (*v*), the number of attesting witnesses or other circumstances attending the execution of the document in question should always be mentioned; so that the conveyancer may be satisfied that every requisite formality has been duly observed. The receipts usually endorsed on purchase and mortgage deeds before the year 1882 (*w*) should be mentioned, as their absence was accounted an informality (*x*). And any formality necessary to give complete effect to any abstracted document should be stated; as probate of a will of personal estate (*y*), the registration of deeds or wills of lands in Middlesex or Yorkshire (*z*), the enrolment of a disentailing deed (*a*), or the acknowledgment (when necessary) of a deed of conveyance by a married woman (*b*).

Tracings of maps or plans.

It has been considered that a map or plan is no necessary part of an abstract (*c*). But the correctness

(*t*) 1 Dart, V. & P. 341; *Re Stamford, &c. Co. & Knight's Contract*, 1900, 1 Ch. 287.

(*u*) See Williams, Real Prop. 206, 13th ed.; 238, 19th ed.

(*v*) Ibid. 298-302, 13th ed.; 374-377, 19th ed.

(*w*) Williams, Real Prop. 193-4, 13th ed.; 596, 19th ed.; Williams, Conv. Stat. 227, 229.

(*x*) Romilly, M. R., *Greenslade* v. *Dare*, 20 Beav. 284, 292; 3 Prest. Abst. 15, 2nd ed.

(*y*) Williams, Pers. Prop. 385, 11th ed.; 426, 15th ed.

(*z*) Williams, Real Prop. 196, 223, 13th ed.; 206, 255, 19th ed.

(*a*) Ibid. 49, 13th ed.; 98, 19th ed.

(*b*) Ibid. 233, 13th ed.; 303, 304, 308, 312-314, 19th ed.

(*c*) *Blackburn* v. *Smith*, 2 Ex. 783, 792, 18 L. J. N. S. Ex. 187; Sug. V. & P. 408.

of this opinion may be doubted; as the verification of the parcels is part of a conveyancing counsel's duty (*d*), and he cannot efficiently discharge it without seeing the plans referred to in the various title-deeds. And when, as is now very frequently the case, a conveyance is made identifying the parcels by reference to a plan, without any separate and independent description of them, it is obvious that the plan is really a material part of the deed, and ought as such to be included in the abstract. It is thought therefore that tracings of any plans referred to in the title-deeds should in all cases be inserted at their places in the abstract; and that, at least wherever a plan is a material part of a title-deed, the purchaser can require to be furnished with a copy thereof as part of the abstract (*e*).

§ 3. *Of the verification of the abstract.*

Vendor bound to verify the abstract.

Besides delivering an abstract of title, the vendor is further bound, in order to discharge his obligation of showing a good title, to verify the abstract by producing all the evidence which is necessary and proper to prove the statements made therein. The vendor must therefore produce, for the examination of the purchaser or his solicitor all the abstracted deeds, both those which he has in his own possession and those of which he has a right to procure the production, and proper evidence of other documents, on which the title depends, such as wills, inclosure awards, Acts of Parliament or orders of the Court; and he must adduce proper evidence of all facts material to the title, as births, marriages, deaths or intestacies (*f*). At common law all such proof had to be made at the vendor's expense (*g*): but now under the Conveyancing Act of 1881, the purchaser, in the

Expense of evidence not in vendor's possession.

(*d*) Sug. V. & P. 413.
(*e*) 1 Dart, V. & P. 345, 346.
(*f*) Sug. V. & P. 414, 415, 417, 420, 429, 431; 1 Dart, V. & P. 350 *sq.*
(*g*) Sug. V. & P. 417, 420, 431.

absence of stipulation to the contrary, has to bear the expense of obtaining and producing all evidence of title, which is not in the vendor's possession (*h*).

Evidence required is (1) of documents, (2) of facts.

Proof on sales differs from proof in litigation.

The proof, which a vendor may be required to furnish of his title, is of two kinds; (1) proof of the abstracted documents, and (2) proof of the facts stated in the abstract. In both of these respects the evidence accepted on sales is not quite the same as what would be required to be given in a court of justice. Thus where it is sought to prove in Court that any person has altered his legal position by some writing, it must be shown, first, that there is or was such a writing as alleged; this is proved primarily by production of the original; and secondly, that the writing is his writing; that is to say, if the writing be a deed, that it is his deed, that is, executed by him, or, if the writing be unsealed, that it was signed or written by him or by his authority so as to bind him. At common law, the second requisite was only dispensed with in the case of documents thirty years old coming from the proper custody; these, whether deeds, wills, letters or similar writings, were and are presumed to have been executed or signed as they purport to be (*i*). In other cases, the execution of any document produced must as a rule have been proved, if the document were attested, by the evidence of an attesting witness, and otherwise by the best evidence, such as the testimony, given in Court at the trial, of the party who executed the document, or some other person present at its execution, or an admission by or on behalf of such party of the fact of execution (*j*). The common law rule as to proving the execution of attested documents was so stringent that such execution

Documents thirty years old prove themselves.

Proof of attested documents.

(*h*) Stat. 44 & 45 Vict. c. 41, s. 3 (6), (9).

(*i*) Taylor, Evidence, §§ 74, 75, 593-601; Stephen, Evidence, Art. 88.

(*j*) Taylor, Evidence, §§ 1637 *sq.*, 1660; Stephen, Evidence, Arts. 15 *sq.*, 63-69.

could not be proved by the admission of the executing party, unless made for the purposes of the cause (*k*). This rule was abolished by the Common Law Procedure Act, 1854, with regard to any instrument, to the validity of which attestation is not requisite; and such instruments may be proved by admission or otherwise, as if there had been no attesting witness thereto (*l*). Under the present practice, the execution of any deed or writing adduced in evidence in an action is generally established by admission made pursuant to a notice in that behalf, which either party may serve on the other (*m*): but of course where there is any contest as to the fact of execution, it must be proved by the best evidence according to the ordinary rule. And on unopposed applications and in non-contentious cases the rule still is that the execution of a deed must be proved by an attesting witness (*n*). Upon sales of land, however, it is not the practice to require evidence of the execution of any of the documents of title, however recent, if found in the proper custody (*o*); unless there be reason to suspect that some particular document was not in fact executed as it purports to be. In the absence of any cause for suspicion, it is presumed by conveyancers that every deed, will or other document of title was executed or signed as appears on the face of the document (*p*). Conveyancers act, in this respect, on the presumption that everything is rightly done, until the contrary be shown (*q*); a presumption which

No evidence of the execution of any document required on sales.

(*k*) *Doe* v. *Durnford*, 2 M. & S. 62; *Call* v. *Dunning*, 4 East, 53.

(*l*) Stats. 17 & 18 Vict. c. 125, s. 26; 28 & 29 Vict. c. 18, ss. 1, 7.

(*m*) R.S.C. 1883, Ord. XXXII. rr. 2, 3, and Appendix B. No. 11.

(*n*) *Re Reay's Estate*, 1 Jur. N.S. 222; *Re Rice*, 32 Ch. D. 35; 1 Seton on Decrees, 138, 5th ed.

(*o*) That is, the custody in which they may reasonably be expected to be found; *Croughton* v. *Blake*, 12 M. & W. 205, 208; *Doe* d. *Jacobs* v. *Phillips*, 8 Q. B. 158.

(*p*) Coventry, Conveyancers' Evidence, 13-16; 1 Sug. V. & P. 418, 438; 1 Dart, V. & P. 353.

(*q*) Litt. sect. 377; Co. Litt. 232 b; *Clarke* v. *Imperial Gas Light and Coke Co.*, 4 B. & Ad. 315; *D'Arcy* v. *Tamar, &c. Ry. Co.*, L. R. 2 Ex. 158, 162; Clippens Oil Co v Edinburgh Trustees, 1904, A.C. 64, 69; Heath v Drown 1905, 2 Ch. 86, 93

is of course greatly strengthened by the fact of the title-deeds being in the custody of the possessors of the land, to which the deeds relate.

What is the strict right of a purchaser as to proof of execution of title-deeds?

The strict right of a purchaser of land in the matter of requiring proof of the execution of the title-deeds has never been exactly defined. Under the old common law practice requiring strict proof of attested documents (*r*), there were conflicting decisions at *Nisi Prius* upon the question whether a vendor suing the purchaser at law for damages for breach of contract must prove the execution of the title-deeds as part of his title (*s*). It was pointed out, however, that such actions are usually brought in consequence of a dispute raised as to the vendor's title—that is, as to the *effect* of the deeds—after the delivery of an abstract and communications thereon, in the course of which the *authenticity* of the deeds has been admitted; and that in such circumstances the purchaser would not be permitted to turn round at the trial and require proof of the genuineness of the deeds themselves (*t*). Under the present practice—first introduced by the Common Law Procedure Act, 1852—any litigant may call upon his adversary to admit any document, saving all just exceptions, on pain, in case of unreasonable refusal, of being ordered to pay the costs of proof (*u*). It is thought, considering the

(*r*) Above, p. 96.

(*s*) That he need not, *Thomson* v. *Miles*, Kenyon, C. J., 1 Esp. 184; that he must, *Crosby* v. *Percy*, Mansfield, C. J., 1 Camp. 303. Lord St. Leonards evidently thought the former the right decision; Sug. V. & P. 439.

(*t*) Tindal, C. J., *Laythoarp* v. *Bryant*, 1 Bing. N. C. 421, 427. The decision there was, that in the absence of any such communications as might establish the admission of the authenticity of the deeds, a vendor suing to recover under special stipulation in the contract the amount of the loss on a re-sale of leasehold property rejected by the original purchaser, and alleging himself to have been *in possession of the property under the lease*, must prove this allegation by showing the execution of the lease in the usual way.

(*u*) Stat. 15 & 16 Vict. c. 76, s. 117; R. S. C. Ord. XXX. r. 2.

long-established practice of conveyancers not to require proof of the execution of title-deeds and the above-mentioned alterations in the law (*v*) and practice as to the proof of documents in an action, that the Court would certainly not uphold a requisition, that the vendor must prove the execution of any document of title less than thirty years old, if made without showing any reason for suspecting authenticity of the document (*w*).

Documents of title may be in private or official custody.

The documentary evidence in support of a title may be of two kinds. First, private writings which are kept in the custody of the parties interested, and which the purchaser can require to be handed over to him on completion; of this kind are the ordinary deeds of conveyance. And secondly, documents which are kept in public or official custody and to the possession of which the purchaser can have no right. Such are Acts of Parliament, public or private, records, orders or proceedings of the Courts of justice, the court rolls of a manor, and wills, if proved. With regard to the latter kind of evidence, the vendor cannot require the purchaser to go and verify the abstract for himself by inspection of the original document; he is bound to produce, at the proper place for verification of the abstract, such evidence of any document in public or official custody as it is the practice for conveyancers to accept; and the purchaser will be entitled *primâ facie* to have this evidence delivered over to him on completion. At common law, the vendor had to bear all the expense of procuring any such evidence (*x*). But under the Conveyancing Act, 1881 (*y*), the purchaser, in the absence of stipulation to the contrary, must bear

Vendor must produce evidence of documents in official custody.

Expense of proving documents not in vendor's possession.

(*v*) Above, p. 97.

(*w*) See 1 Dart, V. & P. 353.

(*x*) Sug. V. & P. 431, 448; 1 Dart, V. & P. 472; 1 Davidson, Prec. Conv. 550, 555, 4th ed.

(*y*) Stat. 44 & 45 Vict. c. 41, s. 3 (6), (9).

the expense of procuring all such evidence, if not in the vendor's possession. The vendor, however, is not released from the obligation of procuring such evidence; he is merely exonerated from the expense of discharging it.

Evidence of public document.

Examined copy.

Exemplification.

Office copies.

Certified copies.

Here it may be mentioned that, in litigation, the contents of any public document may be proved, at common law, either by production of the original document or its equivalent, or by an examined copy, that is, a copy proved by oral evidence to have been examined with the original and to correspond therewith (*z*). An exemplification, which is a copy of a record set out either under the great seal or the seal of a Court, is equivalent to the original document exemplified (*a*); and a copy made by an officer of the Court, who is *bound by law to make it*, is equivalent to an exemplification (*b*). Office copies, or copies made by an officer of the Court, who is authorised by rule of Court *but not required by law* to make them, are not at common law equivalent to an exemplification, save in the same Court *and cause*, in which the proceeding recorded occurred (*c*). But many documents of a public nature are provable under particular Acts of Parliament by copies certified as authentic under some official seal or signature or otherwise (*d*); and in such cases the certified copies are admissible in evidence if they purport to be authenticated as prescribed by law, without proof of the official stamp, seal or signature required or of the official character of the

(*z*) *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102, 106, 124; Taylor, Evidence, §§ 1333, 1368, 1389 *sq.*; Stephen, Evidence, Arts. 73 *sq.**

(*a*) Bac. Abr. Evidence (F); Taylor, Evidence, §§ 1378—1381; Stephen, Evidence, Art. 77.

(*b*) *Appleton* v. *Lord Braybrook*, 6 M. & S. 34, 36—39; *Doe* v. *Lloyd*, 1 Man. & Gr. 671, 684-6; Bac. Abr. Evidence (F); Taylor, Evidence, § 1384; Stephen, Evidence, Art. 77.

(*c*) Taylor, Evidence, §§ 1378—1391; Stephen, Evidence, Art. 78.

(*d*) Taylor, Evidence, § 1440.

* as to what is a public document, see Mercer v Denne, 1904, 2 Ch 534; 1905, 2 Ch 538.

certifier (*e*). And by the Evidence Act, 1851 (*f*), whenever any book or document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no Statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence if it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted. On sales, however, it has always been the practice to receive office copies and extracts in evidence, whether the same would be admissible as evidence in litigation or not (*g*).

Proper place for verification of the abstract.

The proper place for verification of the abstract is either at the vendor's residence, or near the land sold, or in London (*h*). If the title-deeds be produced at any one of these places, the purchaser must, at common law, bear the expense of his solicitor's examination of them and of any journey for this purpose (*i*). The

(*e*) Stat. 8 & 9 Vict. c. 113, s. 1; Taylor, Evidence, §§ 7, 1441; Stephen, Evidence, Art. 79.

(*f*) Stat. 14 & 15 Vict. c. 99, s. 14; Taylor, Evidence, § 1437; Stephen, Evidence, Art. 79.

(*g*) Sug. V. & P. 414, 417; 1 Dart, V. & P. 361; 1 Davidson, Prec. Conv. 550-2, 4th ed. It should be noted that proof of a public document by what is called an examined copy is not available on sales, as the admissibility in evidence of such a copy depends on the statements made on oath in Court of the person who examined the copy with the original; *Crawford Peerage*, 2 H. L. C. 544-5; Taylor, Evidence, § 1389. And an attested copy, that is a copy endorsed with a written and signed declaration that it is a true copy, is of no more use to a purchaser than an office copy, the declaration not being evidence admissible in subsequent litigation; see above, p. 100.

(*h*) If the deeds are to be examined in London, a country solicitor must employ a London agent for the purpose; and he cannot charge his client with the expense of a journey, even though undertaken at his client's request, in order to examine the deeds personally, unless he first explain to his client what is the regular practice. But a London solicitor need not employ a country solicitor as his agent to examine deeds, but may send his own clerk. See *Alsop* v. *Oxford*, 1 My. & K. 564; *Hughes* v. *Wynne*, 8 Sim. 85; *Re Tryon*, 7 Beav. 496; Sug. V. & P. 430; 1 Dart, V. & P. 470, 471.

(*i*) Sug. V. & P. 429; 1 Dart, V. & P. 470; 1 Davidson, Prec. Conv. 554, 4th ed.

vendor may however discharge his obligation by production of all or some of the title-deeds at some other place or places: but in that case he would at common law be bound to pay any additional expense incurred by the purchaser in the examination of the deeds, beyond what would have been incurred if the deeds had been produced at the proper place (*j*). But under the Conveyancing Act, 1881 (*k*), the purchaser, in the absence of stipulation to the contrary, must bear the expenses of the production and inspection of all documents, which are not in the vendor's possession, and of all journeys incidental thereto. The vendor therefore must still produce all documents of title, which are in his own possession, at the proper place for verification of the abstract; or pay the extra expense incurred by their examination elsewhere (*l*). But in the absence of stipulation to the contrary, he can produce any documents of title, which are not in his possession, at whatever place they may happen to be, without being called upon to bear any extra expense so caused. It has been held that, under the last-mentioned enactment, a purchaser must pay all the expense of the examination on his behalf of title-deeds, which are in the possession of the vendor's mortgagees, and are in consequence produced at the office of the mortgagees' solicitors; including the mortgagees' solicitors' costs of such production and examination (*m*). The purchaser must equally bear all the expense of the production and examination of any title-deeds, which are produced at the office of the solicitors to some person, by whom the vendor is entitled to require production of the deeds under some statutory acknowledgment or covenant.

Expense of examining title-deeds not in vendor's possession.

Deeds in possession of vendor's mortgagees—

or other persons than the vendor.

(*j*) *Sharp* v. *Page*, Sug. V. & P. 430; *Hughes* v. *Wynne*, 8 Sim. 85; 1 Dart, V. & P. 471; 1 Davidson, Prec. Conv. 554, 4th ed.

(*k*) Stat. 44 & 45 Vict. c. 41, s. 3 (6), (9).

(*l*) See 1 Davidson, Prec. Conv. 461, 5th ed.

(*m*) *Re Willett and Argenti*, 5 Times L. R. 476; 60 L. T. N. S. 735.

Stamps.

In connection with the production of the abstracted documents, we may mention that the purchaser is entitled to require that every document, on which the proof of the title to the lands sold depends, shall be so stamped, if necessary, as to be available as evidence in a court of justice; insufficiently stamped documents not being, as a rule, receivable in evidence except on payment of a penalty (*n*). If therefore any such document, which is required by law to be stamped, be unstamped or insufficiently stamped, the vendor is bound to procure it to be properly stamped at his own expense; and the purchaser should require him to do so (*o*). In consequence of this liability, vendors often specially stipulated, where necessary, that it should be no objection to the title that any abstracted document appeared to be unstamped or insufficiently stamped, and that the purchaser should bear the expense of procuring any such document to be duly stamped. But it is now enacted (*p*) that every condition of sale framed with the view of precluding objection or requisition upon the ground of absence or insufficiency of stamp upon any instrument executed after the 16th day of May, 1888, and every contract, arrangement, or undertaking for assuming the liability on account of absence or insufficiency of stamp upon any such instrument or indemnifying against such liability, absence, or insufficiency, shall be void. So that if any such special stipulation be now made, it must be limited to instruments executed before the above date (*q*). Such stipulations should not of course be made unless there be reason to suppose that some document of title is insufficiently stamped.

(*n*) See Stat. 54 & 55 Vict. c. 39, ss. 14, 15, replacing 33 & 34 Vict. c. 97, ss. 15—17, and 17 & 18 Vict. c. 125, ss. 28, 29; Sug. V. & P. 566.

(*o*) *Whiting to Loomes*, 14 Ch. D. 822; 17 Ch. D. 10; for a distinction, see *Expte. Birkbeck Freehold Land Society*, 24 Ch. D. 119.

(*p*) Stat. 54 & 55 Vict. c. 39, s. 117, re-enacting 51 & 52 Vict. c. 8, s. 20.

(*q*) 1 Key & Elphinstone, Prec. Conv. 255, 263, 4th ed.

Evidence of facts required on sales.

With regard to the evidence necessary to prove the facts as distinct from the documents stated in an abstract, what a purchaser requires is testimony reduced to writing so that it may be preserved as a muniment of title. So far as the facts may be proved by written evidence admissible in a court of justice, a purchaser is entitled to call for such evidence, if it can be obtained. But if none such can be procured, he must accept other evidence such as it is the established practice to receive on sales. For example, in the matters of pedigree, to prove the facts of birth, marriage and death the purchaser is in the first instance entitled to require certificates of baptism or birth, of marriage and of burial: but if these cannot be found, the vendor may not only have recourse to other evidence admissible in litigation, as statements of deceased members of the family or entries in a family bible or register, but in default of such testimony he may proffer statutory declarations of living members of the family or even of strangers. The written declaration of a living member of the family as to a matter of pedigree may become good evidence after his death, but is inadmissible in court in his lifetime; whilst the like declaration of a stranger can never be evidence admissible in litigation (*r*): but on sales such declarations are nevertheless received (*s*).

Evidence that certain events, which would certainly have affected the title, did not happen.

The purchaser is entitled, pursuant to his right to require proof of all facts material to the title, to call for evidence, not only that the events stated in the abstract took place, but also that other events, of which the occurrence must necessarily have affected the title, did not happen. That an event did not happen is in many cases a matter of inference rather than of positive proof: but if the event be such that its occurrence must necessarily have rendered the title different from that

(*r*) See Stephen, Evidence, Arts. 25, 31.

(*s*) Sug. V. & P. 418; 1 Dart, V. & P. 393.

stated, the purchaser is entitled to require some evidence from which its absence may reasonably be inferred. For example, if it were stated in the abstract that A., a former owner, died leaving B., his only sister, his heiress-at-law, evidence must be given, not only that A. died on the date specified, that his father died before him, and that B. was the child of the same parents as A., but also that A. died intestate, that he left no issue, that he left no brother or any issue of any brother surviving him and that he had no other sister. The production of letters of administration is the evidence usually required on sales in proof of intestacy; facts like the want of issue or the number of children born of a marriage can only be inferred, after the death of the husband and wife, from a declaration by some member of the family or familiar friend that he never knew or heard of there being any issue, or more than certain specified children of the marriage; and such declarations are the evidence usually obtained. So where title was made under a voluntary settlement executed in 1845 on trust for the settlor for life and afterwards on trust for sale, but with a power of revocation, and under a conveyance after the settlor's death in execution of the trust for sale, it was admitted that the purchaser was entitled to proof, first, that the voluntary settlement had not been avoided by a subsequent conveyance for value, and secondly, that the power of revocation had never been exercised. But it was held that, there having been long possession in accordance with the alleged title, sufficient evidence was afforded by a declaration of the settlor's solicitor that he believed that the property remained in the settlor's possession till his death, and that he (the solicitor) had never heard of any sale of the property or of any exercise of the power of revocation (*t*). And it was further con-

(*t*) *Re Marsh and Earl Granville*, 24 Ch. D. 11, 19.

sidered that, apart from this declaration, the necessary evidence was afforded by a recital in the conveyance made after the settlor's death that the property had been sold by auction pursuant to the trust for sale; the truth of which the purchaser was bound to assume under the stipulation making recitals in deeds twenty years old *primâ facie* evidence of the facts recited (*u*). This case appears to show that, whenever a power of appointment has been created, and title is deduced as in default of appointment, the purchaser is entitled to require evidence from which it may reasonably be inferred that the power was never exercised. But where the cesser of a power, as by the death of the donee thereof, is clearly shown, long possession and conveyance for value under the title in default of appointment are of themselves facts raising a presumption that the power was never exercised; and it seems that, in such circumstances, the purchaser must allow due weight to this presumption, and cannot require other evidence beyond what is in the vendor's possession or power or is afforded by his statutory declaration (*v*).

Rule as to presumptions of fact.

Here we may state the general rule with respect to presumptions of matters of fact on sales; which is, that the purchaser is bound to presume whatever a judge would at law direct the jury to presume, but not matters which the judge would leave to the jury to pronounce on the effect of the evidence (*w*). For example, a purchaser may be required to presume, after long possession of lands in accordance with the beneficial title, that some bare legal estate, which was previously outstanding and ought to have been assured

(*u*) *Re Marsh and Earl Granville*, 24 Ch. D. 11, 19; see below, p. 109.

(*v*) 1 Dart, V. & P. 372, 373.

(*w*) *Hillary* v. *Waller*, 12 Ves. 239, 254, 270; *Emery* v. *Grocock*, 6 Madd. 54, 57; Sug. V. & P. 399; 1 Dart, V. & P. 371, 377; Fry, Sp. Perf. 409, 411, 3rd ed.

to the beneficiaries, was duly conveyed to them, although no such conveyance can be found (*x*). But the Court will not oblige a purchaser, who has notice of some equitable incumbrance affecting the property sold, to take a title depending on the fact that the vendor bought without notice of such incumbrance (*y*).

Events of which the happening may or may not have affected the title.

Besides events, which would certainly affect the title, if they occurred, there are other events, the happening of which might or might not affect the title. An instance of this is the marriage of a vendor since the conveyance of the property to him or her, when a marriage settlement may or may not have been made, and, if made, may or may not have affected the property sold. It is conceived that the vendor is, as a rule, bound to answer all questions relevant to the abstracted title, that is, the title he is offering for the purchaser's acceptance (*z*); and he must therefore answer the question whether a particular event, which might or might not have affected the title, has happened. If the answer be that the event has not

(*x*) See *England* d. *Syburn* v. *Slade*, 4 T. R. 682; *Doe* d. *Bowerman* v. *Sybourn*, 7 T. R. 2; *Wilson* v. *Allen*, 1 J. & W. 611, 620; *Cooke* v. *Soltau*, 2 S. & S. 154; and cases cited in previous note; Taylor on Evidence, §§ 113—121.

(*y*) *Freer* v. *Hesse*, 4 De G. M. & G. 495; *Nottingham Patent Brick and Tile Co.* v. *Butler*, 16 Q. B. D. 778, 787, 789, 790.

(*z*) Sug. V. & P. 415, 416; 1 Dart, V. & P. 372. It is submitted that the case of *Re Ford and Hill*, 10 Ch. D. 365, contains nothing contrary to this proposition. It was there held that a vendor is not bound to answer the requisition. Is there to the knowledge of the vendor or his solicitor any settlement, deed, fact, omission or any incumbrance affecting the property not disclosed by the abstract? The Court considered that such a requisition is in fact an interrogatory searching into matters beyond the vendor's duty of furnishing and verifying an abstract of title. Considering the established practice of not abstracting purely equitable charges (above, pp. 90, 92), it seems obvious that this is a correct view. The vendor in delivering an abstract offers the abstracted title as a good title; and if it appears so to the purchaser's advisers, it seems not unreasonable to preclude them from requiring the vendor to set forth generally whatever else he may know about the title. But to require him to answer all questions relevant to the *abstracted* title is an entirely different thing; that does not go beyond requiring him to prove the title which he offers.

happened, it does not appear that the purchaser can in general require any further evidence: though it seems he may call upon the vendor to make (at the purchaser's expense, according to the present rule (*a*)) a statutory declaration of the fact. If the vendor reply that the event happened but did not affect the property sold, the purchaser may require this statement to be confirmed by the production of any evidence in the vendor's possession or power, as well as to be embodied in a statutory declaration: but he cannot, it seems, insist on the production of other evidence (*b*). If the purchaser be informed of the existence of a document, such as a vendor's marriage settlement, which may or may not affect the property sold, and is also told that it did not affect the property sold, he is not fixed with notice of any equitable interest created by the document in the property sold (*c*). But as this is no protection to the purchaser against any legal estate or interest limited by such document in the property purchased, he should of course require the document, if in the vendor's possession or power, to be produced for his solicitor's examination (*d*).

Expense of proof of facts.

At common law the vendor was bound to procure at his own expense the evidence necessary to prove all the facts stated in the abstract (*e*): but under the Conveyancing Act, 1881 (*f*), the purchaser, in the absence of stipulation to the contrary, has to bear the expenses of searching for and procuring all such evidence, which is not in the vendor's possession. As has been previously remarked (*g*), this enactment does not discharge the

(*a*) Above, p. 95.
(*b*) 1 Dart, V. & P. 372, 373.
(*c*) *Jones* v. *Smith*, 1 Ph. 244, 253; *English and Scottish Mercantile Investment Co.* v. *Brunton*, 1892, 2 Q. B. 1, 700.
(*d*) 1 Dart, V. & P. 986. The purchaser cannot require any abstract or copy of such document to be made.
(*e*) Sug. V. & P. 417, 420, 431.
(*f*) Stat. 44 & 45 Vict. c. 41, s. 3 (6, 9).
(*g*) Above, p. 100.

vendor from his obligation of procuring proper evidence of the facts, if he have not any evidence in his possession; it merely exonerates him from the expense of so doing.

Recitals and statements in documents twenty years old.

There are, however, certain facts, of which a purchaser is not entitled (except by special stipulation) to require proof, unless he can show ground for discrediting the statements in the abstract. Under the Vendor and Purchaser Act, 1874 (*h*), it is a term of every contract of sale of land, in the absence of stipulation to the contrary, that recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts of Parliament or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions (*i*). And by the Con-

Recitals of documents

(*h*) Stat. 37 & 38 Vict. c. 78, s. 2 (rule 2). It had been usual for several years previously for vendors to make special stipulations to the same effect: Juridical Society Papers, ii. 589 *sq.*; 1 Davidson, Prec. Conv. 556, 609, 4th ed.; 1 Dart, V. & P. 147, 148, 5th ed.; Williams, Real Prop. 451, 13th ed. The old practice of conveyancers, in the absence of special stipulation, was to dispense with evidence of facts recited in deeds upwards of thirty years old, when there had been uninterrupted possession in accordance with the recitals, and under the deeds containing them, and where there were corroborative circumstances strengthening the presumption that the facts agreed with the recitals; 1 Jarm. Conv. 3rd ed. by Sweet, 121; Coventry, Conv. Ev. 317; see *Fort* v. *Clarke*, 1 Russ. 601.

(*i*) In *Bolton* v. *London School Board*, 7 Ch. D. 766, Malins, V.-C., decided that a recital that *S. Walker*, a former owner of land contracted to be sold, was seised thereof in fee simple, contained in a deed dated twenty-five years before the contract, was by the above enactment rendered evidence that *S. Walker* was so seised until the contrary were shown by the purchaser, and that the vendors were therefore discharged from the obligation of showing a forty years' title. It is submitted that this decision is clearly wrong. First, the law, as we have seen, allows a vendor to discharge his obligation of showing a good title by proof of forty years' title, that is, of forty years' *seisin in fee* by himself and his predecessors in title; above, p. 87. How can this obligation be possibly discharged by proof that one of such predecessors was seised in fee twenty-five years before the contract? Secondly, assuming that the recital must be accepted as evidence of the fact stated, it apparently alleged nothing but a seisin in fee and made no assertion that the land was free from incumbrances (see *Nott* v. *Riccard*, 22 Beav. 307). Mere seisin in fee is perfectly

forming part of the title prior to the time for commencing the abstract.

veyancing Act of 1881 (*j*), the purchaser is required to assume, unless the contrary appear, that the recitals contained in the abstracted instruments of any deed, will or other document forming part of the title prior to the time prescribed by law or stipulated for commencement of title, are correct and give all the material contents of the deed, will or other documents so recited, and that every document so recited was duly executed by all necessary parties and perfected, if and as required, by fine, recovery, acknowledgment, enrolment or otherwise.

Recitals no evidence as a rule.

As a rule, recitals and other statements in deeds are no evidence at all of the facts recited, and are only available as evidence in courts of justice either by way of estoppel at law (*k*) or as admissions (*l*) of a party (*m*) who executed the deed (*n*). They may therefore be evidence against but not for a party to the deed (*o*). But owing to the exceptional rule regarding the admis-

compatible with the existence of a long term of years granted to other persons at a nominal rent to secure either their beneficial occupation or money advanced; and it seems that on this ground the purchaser was plainly entitled to forty years' title, the very object of allowing the investigation of title for forty years past being to enable the purchaser to ascertain, on an inspection of *all* the transactions during that period, that no incumbrances have been created which hinder the vendor from conveying what he contracted to sell. Besides, no one would contend that a vendor shows a forty years' title if he begin the abstract with a deed of conveyance, twenty-five years old, expressly limiting the land to one of his predecessors in fee; and it seems utterly absurd, if this be so, that a mere recital, in the same deed of the grantor's seisin in fee should avail to deprive the purchaser of his right to investigate the earlier title.

(*j*) Stat. 44 & 45 Vict. c. 41, s. 3 (3).

(*k*) *Baker* v. *Dewey*, 1 B. & C. 704; *Harding* v. *Ambler*, 3 M. & W. 279; and see 8 M. & W. 212. This kind of estoppel by deed has become comparatively unimportant since law and equity have been administered in the same Courts under the Judicature Acts of 1873-5, as there was no such estoppel in Courts of Equity; *Coppin* v. *Coppin*, 2 P. W. 291; *Wilson* v. *Keating*, 28 L. J. Ch. 895.

(*l*) *Carpenter* v. *Buller*, 8 M. & W. 209; Taylor, Evidence, §§ 84, 85, 653 *sq.*; Stephen, Evidence, Arts. 15 *sq.*

(*m*) *Fort* v. *Clarke*, 1 Russ. 601.

(*n*) *Tull* v. *Owen*, 4 Y. & C. 192.

(*o*) *Doe* d. *Pritchard* v. *Dodd*, 2 Nev. & Man. 838, 845; *Re Holland*, 1902, 2 Ch. 360, 379, 380.

sion in evidence of statements made *ante litem motam* by a deceased member of a family on matters of pedigree, statements on such matters so made by way of recital in a deed executed by such a person may be received in evidence after his death (*p*). The only instance of a recital affording good evidence for all purposes is a recital in a public (*q*) Act of Parliament. This is held to be admissible, though not conclusive (*r*) proof of the facts recited, on the ground that it is not to be supposed that a statute, which is made by the sovereign authority of the realm, would contain an untrue statement (*s*). Statutory declarations of a member of the family as to matters of pedigree are admissible in evidence after the deponent's death, if they were made before any controversy had arisen as to the facts deposed to (*t*). But with this exception, statutory declarations as to matters of title are not admissible as evidence in litigation (*u*), unless against the deponent, or his privies in estate, blood or law as an admission by him (*v*), or after the deponent's death as a statement (if so made) either against his pecuniary or proprietary interest, or in the course of his business or professional duty, or as to public or general rights (*w*). A recital of a document in a deed operates as an admission of the existence and due execution of the recited document by a party to the deed containing the recital, who has

Recital in a public statute.

(*p*) *Welcome* v. *Upton*, 6 M. & W. 536, 539; *Doe* d. *Jenkins* v. *Davies*, 10 Q. B. 314.

(*q*) A recital in a private Act of Parliament is not, as a rule, evidence of the fact recited: *Brett* v. *Beales*, M. & M. 421; *Beaufort* v. *Smith*, 4 Ex. 450; *The Shrewsbury Peerage*, 7 H. L. C. 1; *Cowell* v. *Chambers*, 21 Beav. 619.

(*r*) *R.* v. *Greene*, 6 A. & E. 548.

(*s*) Co. Litt. 19 b; *R.* v. *De Berenger*, 3 M. & S. 67, 69; *R.* v. *Sutton*, 4 M. & S. 532, 542.

(*t*) *Berkeley Peerage Case*, 4 Camp. 401; *Reilly* v. *Fitzgerald*, Dru. 122; *Gee* v. *Ward*, 7 E. & B. 509; *Shedden* v. *Patrick*, 2 Swa. & Tr. 187; Sug. V. & P. 418; Hubback, Ev. Succ. 68, 69; Taylor, Evidence, §§ 571 *sq.*; Stephen, Evidence, Art. 31.

(*u*) Hubback, Ev. Succ. 66, 67.

(*v*) Taylor, Evidence, §§ 653 *sq.*; 712 *sq.*; Stephen, Evidence, Arts. 15, 16.

(*w*) Taylor, Evidence, §§ 543 *sq.*; 602 *sq.*; 630 *sq.*; Stephen, Evidence, Arts. 25, 27, 28, 30.

executed and taken some benefit under the deed (*x*): but such a recital is not, generally speaking, any evidence of the existence or execution of the recited document, or of its contents, as against other persons (*y*). And even against parties to the deed, the recital is not evidence of any part of the contents of the recited documents, beyond what is recited (*z*). But if it has been proved that a document recited in a deed has been lost, the recital may be good secondary evidence of the lost document, when there has been long uninterrupted possession in accordance therewith (*a*).

Recitals of facts do not excuse vendor from proof.

Apart from the stipulation now incorporated in contracts as above mentioned (*b*) by the Vendor and Purchaser Act, 1874, and except so far as recitals or statements are evidence admissible in litigation, the vendor's obligation to furnish evidence of all facts material to the title (*c*) is in no way discharged by reason of any such facts being stated or recited in deeds or other instruments appearing on the abstract (*d*). But conveyancers can generally accept statutory declarations made on some previous sale and produced by the vendor from among the muniments of title as evidence of the facts deposed to therein; as, if there be no reason to suspect the authenticity of the declaration and the facts asserted are such as are usually proved on sales by statutory declaration, a new statutory declaration would seldom afford better evidence than an old one. And, as we have seen, in some cases an old statutory declaration may have become good evidence through the death of the deponent.

(*x*) *Burnett* v. *Lynch*, 5 B. & C. 589, 601; *Bringloe* v. *Goodson*, 5 Bing. N. C. 738.

(*y*) *Moulton* v. *Edmonds*, 1 De G. F. & J. 246, 251; Burton, Comp. pl. 480.

(*z*) *Gillett* v. *Abbott*, 7 A. & E. 783.

(*a*) *Moulton* v. *Edmonds*, 1 De G. F. & J. 246, 252.

(*b*) Above, p. 109.

(*c*) Above, p. 95.

(*d*) 1 Jarm. Conv. 3rd ed. by Sweet, 120; 1 Dart, V. & P. 328, 5th ed.; 372, 6th ed.; Williams, Real Prop. 451, 13th ed.

Acceptance of irregular evidence.

Now that the purchaser is, as a rule, bound to pay the expense of procuring all evidence necessary to verify the abstract but not in the vendor's possession (*e*), his natural endeavour is to obtain satisfactory proof at the least cost to himself. Hence it frequently happens in practice that a purchaser accepts irregular evidence—evidence which he could not be required to accept—to save himself the expense of the regular mode of proof. Great caution should always be observed in admitting such proof. It is true that if any fact on which title depends be established, the purchaser may suffer no inconvenience from not having the regular conveyancing evidence in his possession. If he sell, the purchaser from him will by the rule be at the cost of procuring it. But if a fact admitted on irregular evidence be not verifiable by regular evidence, the purchaser may obviously find himself at serious disadvantage on a re-sale. As an example of the reception of irregular evidence, where a man's death is the fact to be proved, a purchaser may, it is conceived, usually rest satisfied with production of the probate of his will or of letters of administration to his effects (*f*), or even of the receipts for succession duty paid as on his death. Indirect evidence of this kind is often to be found in the vendor's possession, and may save the expense of getting a certificate. In this case it will be observed that the fact of death is inferred, not only from the presumption that things are rightly done (*g*), but also from the fact that the survivors have done an act against their own interest in paying death duty; and such payment and the granting of probate or administration are acts extraneous to the title. Again, the

(*e*) For many years before the commencement of the Conveyancing Act, 1881, it was usual for vendors to stipulate specially that the purchaser should bear this expense; Juridical Society Papers, ii. 589, 590; 1 Davidson, Prec. Conv. 506, 555, 609, 4th ed.

(*f*) Coventry, Conveyancers' Evidence, 278, 279; Sug. V. & P. 418.

(*g*) Above, p. 97.

presumption that things are rightly done is greatly strengthened whenever valuable consideration has been given on the faith of certain events having taken place. Thus if the death of a joint mortgagee be stated, and it appear that, on a subsequent transfer or purchase, a conveyance has been accepted from the surviving mortgagees as having become entitled in consequence of his death, it is hardly a rash assumption that the death took place as alleged. But it would not be advisable to dispense with proof of the alleged recent death of a trustee merely because in a subsequent deed a new trustee is appointed as upon his death. In this case no act extraneous to the title has been done on the faith of the event in question having occurred.

Great importance of the verification of the abstract.

The extreme importance of the proper verification of the abstract is too often overlooked. The abstract being the chief document delivered and the only document laid before and commented on by counsel, there is always a certain danger of losing sight of the fact, that *the most perfect abstract is no evidence at all of title.* It is only when we turn away from the abstract to the verification of it that the real proof of title begins. The most severe scrutiny of the abstract may be utterly useless if the purchaser's advisers are lax in exacting or examining the evidence in support of it. Extreme care should therefore be observed in dispensing with any of the evidence regularly necessary to verify the abstract; and if it be proposed to accept any irregular or indirect evidence, the conveyancer should weigh well the reasons why the same may be regarded as affording substantial proof.

Importance of the examination of the title deeds with the abstract.

It seems needless but is really very necessary to point out that no part of the verification of the abstract is more important than the examination of the title deeds. This is especially the case at the present day, when

abstracts are constantly delivered, which have been drawn in the most slovenly and unskilled manner. This fact enhances the necessity of Lord St. Leonards' emphatic warning, that the examination of the title-deeds with the abstract should never be left to an incompetent person (*h*). As Mr. Dart pointed out, it is a duty requiring the most scrupulous care, the object of the examination being four-fold; to ascertain, first, that what has been abstracted is correctly abstracted; secondly, that what is omitted is clearly immaterial; thirdly, that all the documents are perfect as respects execution, attestation, endorsed receipts, registration, stamps, &c.; and fourthly, that there are no endorsed notices, nor any circumstances attending the mode of execution or attestation, &c., which are calculated to excite suspicion (*i*). Every part of every document, especially of a will, should be read through (*j*). And very particular attention should be given to the execution of the documents; for, as we have seen (*k*), it is not the practice on sales to require any other evidence of the execution of the documents of title than is apparent on the documents themselves.

Proof of identity of property.

Besides verifying the documents and facts stated in the abstract, the vendor is bound, in the absence of special stipulation, to prove the identity of the property described in the contract for sale with that specified in the title deeds (*l*). The requisite evidence of identity is usually obtained from ancient plans, leases, extracts from parish and land-tax books, and statutory declarations of old people (*m*). It is, however, a common stipulation in contracts for sale of land that the purchaser shall admit the identity of the property

(*h*) Sug. V. & P. 411.
(*i*) 1 Dart, V. & P. 480.
(*j*) Ibid.; Sug. V. & P. 411.
(*k*) Above, p. 97.
(*l*) Above, p. 28.
(*m*) 1 Davidson, Prec. Conv. 557, 4th ed.; 463, 5th ed.

purchased with that comprised in the muniments offered by the vendor as the title to such property upon the evidence afforded by a comparison of the descriptions contained in the particulars of sale and in the muniments (*n*). This condition deprives the purchaser of his right to require independent evidence of identity: but it does not exonerate the vendor from proving identity as part of his obligation to show a good title. If therefore a comparison of the descriptions in the title deeds with the description in the contract afford no evidence that the property purchased is the same as or is part of the property to which the deeds relate, the vendor cannot force the title on the purchaser without giving further evidence of identity (*o*).

Evidence of particular matters.

It may be convenient to consider the various matters, of which proof is generally required on sales, in alphabetical order as follows:—

Acknowledgment.

Acknowledgment of a deed by a married woman under stat. 3 & 4 Will. IV. c. 74:—proved, if the deed were executed before the 1st of January, 1883, by the memorandum of acknowledgment in the proper form endorsed on or written at the foot or in the margin of the deed, and an office copy of the certificate of acknowledgment (*p*), the filing of which was essential (*q*); if the deed were executed on or after the 1st of January, 1883, by a memorandum only in the proper form endorsed on or written at the foot of or in the margin of the deed and purporting to be signed by a person authorized to take the acknowledgment (*r*).

(*n*) 1 Davidson, Prec. Conv. 610 and n., 4th ed.; 520, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 262, 5th ed.; above pp. 54, 60.

(*o*) *Flower* v. *Hartopp*, 6 Beav. 476; *Curling* v. *Austin*, 2 Dr. & Sm. 129; and see Sug. V. & P. 26; 1 Dart, V. & P. 174, 175; and Ch. VI., below.

(*p*) Stats. 3 & 4 Will. IV. c. 74, ss. 84—88; 4 & 5 Will. IV. c. 92, ss. 75—79, as to Ireland; 45 & 46 Vict. c. 39, s. 7 (8).

(*q*) *Jolly* v. *Handcock*, 7 Ex. 824.

(*r*) Stat. 45 & 46 Vict. c. 39,

Act of Parliament. A public Act needs no proof, the Court taking judicial notice of public Statutes (*s*). A private Act is proved by a copy thereof purporting to be printed by the Queen's printers (*t*), or by a copy thereof proved to have been examined with the Parliament Roll (*u*). Act of Parliament.

Award of enfranchisement. If made under the Copyhold Act, 1858, proved by a copy thereof purporting to be sealed or stamped with the seal of the Copyhold Commissioners (*v*). If made under the Copyhold Act, 1887, proved in the same way or by a copy of the entry directed to be made of the award in the court rolls of the manor (*w*). The Copyhold Act, 1894 (*x*), repealed, without re-enacting, the section of the Act of 1852 (*y*) which made awards provable by such evidence in courts of justice. But similar evidence of awards of enfranchisement made under the Act of 1894 (*z*) would appear to be receivable by conveyancers on a sale. Award of enfranchisement.

s. 7, and Rules thereunder; see Williams's Conveyancing Statutes, 281, 477.

(*s*) *R.* v. *Sutton*, 4 M. & S. 532, 542.

(*t*) Stat. 8 & 9 Vict. c. 113, s. 3.

(*u*) Taylor on Evidence, § 1368, vol. ii. p. 1315, 5th ed.; and see Coventry, Conveyancers' Evidence, 81; Burt. Comp. pl. 482; above, p. 100.

(*v*) After the year 1882, the Copyhold Commissioners were styled the Land Commissioners, and on the 12th August, 1889, their powers and duties were transferred to the Board of Agriculture; stats. 45 & 46 Vict. c. 38, s. 48; 52 & 53 Vict. c. 30. s. 2.

(*w*) See stats. 15 & 16 Vict. c. 51, s. 49; 21 & 22 Vict. c. 94, s. 10; 50 & 51 Vict. c. 73, s. 22.

(*x*) Stat. 57 & 58 Vict. c. 46, s. 100.

(*y*) Stat. 15 & 16 Vict. c. 51, s. 49.

(*z*) Under this Act, 57 & 58 Vict. c. 46, s. 10 (1), (5), enfranchisement is made by an award confirmed by the Board of Agriculture, who are to send a copy of the confirmed award sealed or stamped with the seal of the Board to the lord, and the lord is to "cause the copy to be entered in the court rolls of the manor." Under stat. 52 & 53 Vict. c. 30, s. 7, every document purporting to be an order, licence, or other instrument issued by the Board of Agriculture, and to be sealed with the seal of the Board, authenticated by the signature of the president or some member of the Board, or the secretary or some person authorized by the president to act on behalf of the secretary, or purporting to be signed by a secretary, or any person authorized by the president to act on behalf of the secretary, shall be received in evidence and be deemed to be

Award of inclosure.

Award as to the inclosure of common lands made under an Act incorporating the Inclosure Consolidation Act, 1801, or other special Inclosure Act. Proved by a copy or extract signed by the proper officer of the Court, if the Award were enrolled in one of the Courts of Westminster, or, if the Award were enrolled with the clerk of the peace for the county in which the lands lie, by the clerk or his deputy, and purporting to be a true copy (*a*).

Award under General Inclosure Act, 1845.

Award as to inclosure of common lands made under the General Inclosure Act, 1845. Proved by a copy purporting to be sealed with the seal of the Board of Commissioners under the Act (*b*), or by a copy or extract signed by the clerk of the peace of the county in which the lands lie, or his deputy, purporting the same to be a true copy (*c*).

Bankruptcy.

Bankruptcy, proceedings in. Provable in litigation in the same manner as other proceedings in *Courts* (*q.v.*), and also by copies certified as required by the various Bankruptcy Acts (*d*). Under the present Bankruptcy Act, a receiving order or an adjudication of bankruptcy is also conclusively proved by production of a copy of the *London Gazette* containing a notice thereof (*e*); the appointment of a trustee is proved by the certificate of

such order, licence or instrument, without further proof unless the contrary is shown.

(*a*) Stats. 41 Geo. III. c. 109, s. 35; 3 & 4 Will. IV. c. 87, s. 2.

(*b*) These Commissioners were first styled the Inclosure Commissioners for England and Wales; after 1882 they were styled the Land Commissioners; and on the 12th August, 1889, their powers and duties were transferred to the Board of Agriculture; stats. 8 & 9 Vict. c. 118, s. 2; 45 & 46 Vict. c. 38, s. 48; 52 & 53 Vict. c. 30, s. 2. See note (*v*) to p. 117, above.

(*c*) Stat. 8 & 9 Vict. c. 118, ss. 2. 146.

(*d*) Stats. 46 & 47 Vict. c. 52, ss. 134, 137; 32 & 33 Vict. c. 71, ss. 107—109; 24 & 25 Vict. c. 134, ss. 203 *sq.*; 12 & 13 Vict. c. 106, ss. 232 *sq.*; 1 & 2 Will. IV. c. 56, s. 29; 6 Geo. IV. c. 16, s. 97.

(*e*) Stat. 46 & 47 Vict. c. 52, s. 132.

appointment (*f*); and the proceedings at a statutory meeting of creditors are proved by a minute signed at the same or the next meeting by a person describing himself as or appearing to be the chairman of the meeting at which the minute is signed (*g*). On sales, office copies are accepted as evidence, whether receivable as evidence in Court, or not (*h*).

Copyholds.

Copyholds, assurances of. The law regards the court rolls of a manor as a public document (*i*), and so permits entries therein to be proved either by production of the rolls (*j*), by examined copies (*k*) or by copies signed by the steward (*l*), such as are always delivered to the tenants on the completion of a transaction acknowledging their title (*m*). According to the strict rule of the common law, the last mentioned mode of proof was incomplete without evidence of the steward's handwriting, unless the copy were thirty years old at least (*n*) and came from the proper custody (*o*). But entries in court rolls are provable under the Evidence Act, 1851 (*p*), by copies *purporting* to be signed and certified as true copies by the officer to whose custody the originals are entrusted, that is, as a rule, the steward. On sales of copyholds, the assurances entered on the court rolls are usually proved by copies thereof signed by the steward, and it is not the practice to require any proof of the steward's handwriting (*q*), copies purporting to be signed by the steward being

(*f*) Sect. 54 (4).

(*g*) Sect. 133.

(*h*) Sug. V. & P. 417; 1 Dart, V. & P. 361.

(*i*) Taylor, Evidence, §§ 1433, 1438.

(*j*) *Doe* d. *Bennington* v. *Hall*, 16 East, 208.

(*k*) *Doe* d. *Cawthorn* v. *Mee*, 4 B. & Ad. 617; *Doe* d. *Burrows* v. *Freeman*, 12 M. & W. 844; *Breeze* v. *Hawker*, 14 Sim. 350.

(*l*) 1 Scriv. Cop. 590, 3rd ed.

(*m*) Williams, Real Prop. 455, 18th ed.

(*n*) Above, p. 96.

(*o*) 1 Scriv. Cop. 591, 3rd ed.; 2 Wat. Cop. 39, n., 4th ed.; *Wynne* v. *Tyrwhitt*, 4 B. & A. 376.

(*p*) Stat. 14 & 15 Vict. c. 99, s. 14, Taylor, Evidence, §§ 1437, 1438; above, p. 101.

(*q*) Sug. V. & P. 417; 1 Dart, V. & P. 351.

accepted as genuine, unless there be some reason for suspecting their authenticity (*r*). A vendor of copyholds is as a rule bound to procure proper copies of court roll signed by the steward for verification of the abstract; he cannot require the vender to go and compare the abstract with the original rolls (*s*): but, under the Conveyancing Act, 1881 (*t*), the purchaser will be obliged to pay the expense of obtaining such copies, if not in the vendor's possession.

Courts, proceedings of.

Courts of justice, records and proceedings of. As a rule, these are provable in litigation (1) by production of the original, which is usually inconvenient; or (2) by an exemplification, or its equivalent; or (3) by an examined copy (*u*). As we have seen (*u*), a copy made by an officer of the Court *bound by law to make it* is equivalent to an exemplification: whilst office copies, or copies made by an officer of the Court who is authorised by rule of Court *but not required by law to make them*, are not at common law equivalent to an exemplification, save in the same Court *and cause*, in which *the proceeding* occurred (*v*). But office copies of all writs, records, pleadings and documents filed in the High Court of Justice are admissible in evidence to the same extent as the original (*w*). Besides the above modes of proof, there are various particular cases in which the proceedings of Courts are by Statute provable in litigation by copies certified as required by the

Office copies.

(*r*) See above, p. 97.

(*s*) Sug. V. & P. 431; 1 Dart, V. & P. 352, where it is submitted that the vendor will discharge his obligation, if he can produce the original rolls at the proper place for verification of the abstract, and satisfactorily account for the absence of the copies of court roll from time to time delivered to the tenants.

(*t*) Stat. 44 & 45 Vict. c. 41, s. 3 (6).

(*u*) Above, p. 100.

(*v*) Taylor, Evidence, §§ 1378—1391; Stephen, Evidence, Art. 78.

(*w*) R. S. C. 1883, Order 37, rule 4.

Act (*x*). For example, proceedings in bankruptcy (*y*) and orders in lunacy (*z*) are now provable in this way. And under the Evidence Act, 1851 (*a*), the proceedings of courts of justice not provable by copies under any other Statute appear to be provable by certified copies (*b*). The records of the Courts deposited in the Record Office are also provable as records under the charge of the Master of the Rolls (*c*). On sales, however, the practice is to accept office copies as evidence, whether the same would be receivable in evidence on litigation or not (*d*).

Crown grants.

Crown grants are proved by production of the original under the great seal, the privy seal or the royal sign manual; but as they are matters of public record, they are also provable by exemplifications or examined copies (*e*), or under the Evidence Act, 1851, by certified copies (*f*). But on sales, if the original be not forthcoming, it seems that the purchaser cannot require the vendor to furnish him with a copy in accordance with the general rule (*g*), but must examine the enrolment at his own expense (*h*).

Deeds.

Deeds and private writings are, as we have seen (*i*), primarily proved on sales by production of the originals, and proof of execution or signature is not usually required. If any such document, which ought to be

Missing documents.

(*x*) Taylor, Evidence, §§ 1391 *sq.*, 1440; Stephen, Evidence, Art. 79; above, p. 100.

(*y*) Stat. 46 & 47 Vict. c. 52, s. 134.

(*z*) Stat. 53 Vict. c. 5, s. 144.

(*a*) Stat. 14 & 15 Vict. c. 99, s. 14; above, p. 101.

(*b*) *Reeve* v. *Hodson*, 10 Hare, App. xix.

(*c*) See below; Taylor, Evidence, §§ 1337, 1338, 1377.

(*d*) Sug. V. & P. 417; 1 Dart, V. & P. 361; 1 Davidson, Prec. Conv. 552, 4th ed.; 459, 5th ed.

(*e*) 2 Black. Comm. 346; Taylor, Evidence, § 1371, p. 1316, 5th ed.; above, p. 100.

(*f*) 1 Dart, V. & P. 359; above, p. 101.

(*g*) Above, p. 99.

(*h*) Sug. V. & P. 431; 1 Dart, V. & P. 359; 1 Davidson, Prec. Conv. 531, 4th ed.

(*i*) Above, p. 96.

produced, be missing, its destruction or loss must be proved, either by evidence of actual destruction, or by showing that search has been made for it without result in all places where it is reasonably likely to have been deposited. If its destruction or loss be so established, secondary evidence may be given of its contents (*j*), such as a counterpart, draft, copy or abstract thereof proved to be correct (*k*), or a recital thereof in a subsequent instrument (*l*): but in such case the execution of the missing document must be duly proved (*m*). A missing document will be presumed to have been duly stamped, in the absence of anything to show the contrary (*n*).

Enrolment.

Enrolment. The proper evidence of the enrolment of any document required by Statute to be enrolled, as deeds of bargain and sale of any estate of inheritance in lands (*o*), conveyances to charitable uses (*p*) and disentailing assurances (*q*), depends generally on the terms of the particular Act. But where it is the practice to deliver back the original deed to the parties from the enrolment office with a memorandum of the enrolment endorsed thereon, and purporting to be made by the proper officer, and it is his duty to make the

(*j*) *Hart* v. *Hart*, 1 Hare, 1; *Fitzwalter Peerage*, 10 Cl. & Fin. 946, 952-3; *Green* v. *Bailey*, 15 Sim. 542; *Richards* v. *Lewis*, 11 C. B. 1035; *R.* v. *Saffron Hill*, 1 E. & B. 93; Taylor, Evidence, §§ 398, 399; Sug. V. & P. 437, 438; 1 Dart, V. & P. 159, 353; 1 Davidson, Prec. Conv. 551, 4th ed; Moulton v Edmonds 1 De G. F. & J. 246, 251.

(*k*) In litigation, when secondary evidence of the contents of a document is admitted, there is no question whether any particular kind of secondary evidence is better than another, and recourse may be had at once to oral evidence of the contents: *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102; Taylor, Evidence, § 495; Stephen, Evidence, Art. 70.

(*l*) Above, p. 112; *Alexander* v. *Crosby*, 1 J. & L. 666.

(*m*) *Bryant* v. *Busk*, 4 Russ. 1; see also the authorities cited in note (*j*), above. Execution may be presumed after a long lapse of time; *Moulton* v. *Edmonds*, 1 De G. F. & J. 246.

(*n*) *Hart* v. *Hart*, 1 Hare, 1; Taylor, Evidence, § 127.

(*o*) Stat. 27 Hen. VIII. c. 16.

(*p*) Stat. 51 & 52 Vict. c. 42, s. 4, replacing 9 Geo. II. c. 36, and amended by 54 & 55 Vict. c. 73.

(*q*) Stat. 3 & 4 Will. IV. c. 74, s. 41.

memorandum, such memorandum is at common law sufficient evidence of the enrolment, without proof of the officer's signature or official character (*r*). This is the case with respect both to deeds of bargain and sale enrolled (*s*) and conveyances to charitable uses (*t*). And by a Statute of 1849 (*u*) it was provided that all deeds enrolled in the Petty Bag Office or in the Enrolment Office in Chancery (which include conveyances to charitable uses and disentailing assurances) should be endorsed with a certificate of enrolment under the seal of the office, and that such certificate should be sufficient *primâ facie* evidence of the enrolment, and the time thereof. Since the 6th of April, 1880, the Enrolment Department of the Central Office has been the place of enrolment of all deeds which by any statute or statutory rule are directed or permitted to be enrolled in any of the Courts whose jurisdiction has been transferred to the High Court of Justice; and certificates appearing to be sealed with a seal of the Central Office shall be presumed to have issued from the Central Office, and may be received in evidence without further proof of authenticity (*v*).

Exchange or partition, order of.

Exchange or partition, order of, under the Inclosure Act, 1845, and amending Acts (*w*), proved by a copy of the order under the seal of the Commissioners or the Board of Agriculture, according to the date of the order (*x*).

(*r*) *Doe* v. *Lloyd*, 1 Man. & Gr. 671, 684-5; Taylor, Evidence, § 1462.

(*s*) Taylor, Evidence, § 1462.

(*t*) *Doe* v. *Lloyd*, ubi sup.

(*u*) Stat. 12 & 13 Vict. c. 109, ss. 12, 18, repealed with extensive savings (see 28 Ch. D. 107) by 56 & 57 Vict. c. 54.

(*v*) R. S. C. 1883, rr. 7, 9, replacing R. S. C. April, 1880, rr. 45, 46.

(*w*) See stats. 8 & 9 Vict. c. 118, ss. 147, 150; 9 & 10 Vict. c. 70, ss. 9—11; 10 & 11 Vict. c. 111, ss. 4, 6; 11 & 12 Vict. c. 99, ss. 13, 14 (partition); 12 & 13 Vict. c. 83, ss. 7, 11; 15 & 16 Vict. c. 79, ss. 31, 32; 17 & 18 Vict. c. 97, s. 5; 20 & 21 Vict. c. 31, ss. 4—11; 22 & 23 Vict. c. 43, ss. 10, 11; 39 & 40 Vict. c. 56, s. 33.

(*x*) See above, p. 118, n. (*b*).

Fine.

Fine:—proved (1) by the chirograph, that is, the indentures which were made recording the transaction and which it was the duty of the proper officer to deliver to the parties (*y*); (2) by an exemplification; (3) by an examined copy (*z*); (4) as a record under the charge of the Master of the Rolls (*a*). Conveyancers usually received office extracts as evidence (*b*).

Lease for a year.

Lease for a year made for giving effect to a release executed before the 15th of May, 1841:—proved, without giving any evidence of loss, by the recital or mention thereof in the release (*c*).

Pedigree; birth.

Pedigree, matters of. The regular conveyancing evidence that a child was born of certain parents is a certificate of baptism (*d*), that is, a certified extract from the parochial register (*e*). But a certificate of birth, which is a certified extract from the general register of births (*f*), appears to be equally good (*g*).

Age.

A certificate of baptism or birth affords no exact evidence of a child's age, beyond that the child was born before the date of the certificate (*h*): but the Court, in pedigree cases, may look at the statements contained in such certificates, and weigh them in connection with

Marriage.

other evidence (*i*). Marriage is regularly proved by

(*y*) Black Comm. 296, 351; Taylor, Evidence, § 1384; *Appleton* v. *Braybrook*, 6 M. & S. 34, 37, 38.

(*z*) Burt. Comp. pl. 487.

(*a*) See below: Taylor, Evidence, §§ 1338, 1377.

(*b*) Burt. Comp. pl. 489; Sug. V. & P. 414; 1 Dart, V. & P. 356.

(*c*) Stat. 4 & 5 Vict. c. 21, s. 2. This Act was repealed by stat. 37 & 38 Vict. c. 96, but with such extensive savings that the rule enacted by s. 2 seems to be preserved, see *Sayers* v. *Collyer*, 28 Ch. D. 103, 107; Dart, V. & P. 356.

(*d*) Coventry, Conveyancers' Evidence, 278; Sug. V. & P. 415; 1 Dart, V. & P. 392.

(*e*) See Taylor, Evidence, §§ 1436-8, pp. 1369-71, 5th ed.

(*f*) Established by stat. 6 & 7 Will. IV. c. 86, amended by 1 Vict. c. 22.

(*g*) 1 Dart, V. & P. 392.

(*h*) *Doe* d. *Wollaston* v. *Barnes*, 1 Moo. & R. 386, 389; *Re Wintle*, L. R. 9 Eq. 373.

(*i*) *Re Turner*, 29 Ch. D. 985, 991-2; *Re Goodrich*, 1904, P. 138.

a certificate of marriage extracted from the parochial or general register; and death by a certificate of burial (*j*). And it is doubtful whether a purchaser would be compelled to accept a certificate of death as evidence of that fact, unless good reason were given for not producing a certificate of burial (*k*). Here we may observe that when the facts of birth, marriage or death have to be proved to the Court on such occassions as the payment of money out of Court, the necessary certificates must be accompanied by affidavits as to the identity of the parties named in the certificates (*l*): but it is not the practice to require similar evidence of identity on sales, unless the identity be not apparent on the face of the certificate (*m*). Extracts from non-parochial registers of birth, baptism, marriage or death, as those kept in dissenting communities, have long been received by conveyancers as evidence (*n*); and extracts from certain non-parochial registers deposited with the Registrar-General are now available as evidence in litigation (*o*). As we have seen (*p*), in the absence of the regular formal evidence of these facts, recourse is had to other means of proof; preferably, of

Death.

(*j*) Coventry, Conveyancers' Evidence, 278; Sug. V. & P. 415; 1 Dart, V. & P. 392; 1 Davidson, Prec. Conv. 553, 4th ed. *

(*k*) 1 Dart, V. & P. 392. In proceedings to obtain payment of money out of Court, if it be sought to prove death by a certificate of death and affidavit of identity, the Court will require proof of burial as well; *Risdey* v. *Shephard*, W. N. 1873, p. 150; 21 W. R. 782. There are previous conflicting decisions; *Leach* v. *Leach*, 8 Jur. 211; contra, *Parkinson* v. *Francis*, 15 Sim. 160.

(*l*) Dan. Ch. Pr. 591, n. (*y*), 6th ed.; Seton on Decrees, 136, 5th ed. But at law such certificates may be put in evidence without proof of identity, the question of identity being for the jury; *Hubbard* v. *Lees*, L. R. 1 Ex. 255, 257.

(*m*) Coventry, Conveyancers' Evidence, 278; and see Sug. V. & P. 417. From what is said in Dart, V. & P. 392, and 1 Davidson, Prec. Conv. 553, 4th ed., 460, 5th ed., one would gather that evidence of identity was usually required: but it is submitted that on sales the practice is as above stated.

(*n*) Sug. V. & P. 418; 1 Dart, V. & P. 392.

(*o*) See stat. 3 & 4 Vict. c. 92, amended by 21 & 22 Vict. c. 25; Taylor, Evidence, § 1354, pp. 1304-5, 5th ed.

(*p*) Above, p. 104.

*: As to the presumption of marriage, see Re Shephard 1904, 1 Ch 456, & cases there cited.

course, to evidence admissible in litigation, such as the declarations of deceased members of the family (*q*), but in default thereof, to statutory declarations of living members of the family and even of strangers.

Record in Record Office.

Record under the charge and superintendence of the Master of the Rolls for the time being (*r*). Proved by a copy certified as true and authentic by the deputy keeper of the records, or one of the assistant record keepers, and purporting to be sealed or stamped with the seal of the Record Office (*s*).

Recovery.

Recovery, common :—proved by an exemplification or an examined copy (*t*) or as a record under the charge of the Master of the Rolls (*u*). Conveyancers accepted office extracts (*v*).

Registration.

Registration of assurances in Middlesex or Yorkshire: —proved by the certificate of registration which it is the registrar's duty to indorse and sign on the registered assurance (*w*). Under the Yorkshire Registries

(*q*) As to the evidence admissible in matters of pedigree, see Taylor, Evidence, §§ 571 *sq.*, pp. 569 *sq.*, 5th ed., Stephen, Evidence, Art. 31 ; 1 Dart, V. & P. 381—397.

(*r*) See Taylor, Evidence, §§ 1337, 1338.

(*s*) Stat. 1 & 2 Vict. c. 94, ss. 1, 12, 13.

(*t*) Coventry, Conveyancers' Evidence, 77 ; Burt. Comp. pl. 490 ; 1 Dart, V. & P. 356.

(*u*) See above.

(*v*) Sug. V. & P. 414. By stat. 14 Geo. II. c. 20, ss. 4, 5, repealed with extensive savings (see 28 Ch. D. 107) by 30 & 31 Vict. c. 59, where an estate had been purchased and held for twenty years under a title which a recovery was necessary to complete, the purchaser and all claiming under him might prove a recovery, of which no record could be found or which appeared not to be regularly entered on record, by production of a deed making a tenant to the Præcipe and declaring the uses of the recovery and executed by a person having a sufficient estate for the purpose ; and every recovery twenty years old, to which the persons having power to bar the entail were parties, was made valid, if it appeared on the face thereof that there was a tenant to the writ, notwithstanding that the deed for making such tenant were lost or did not appear ; see Burt. Comp. pl. 682—694.

(*w*) Stats. 7 Anne, c. 20, s. 6, as to Middlesex ; 46 & 47 Vict. c. 54, s. 9, as to Yorkshire, replacing 2 & 3 Anne, c. 4, s. 8 ; 6 Anne, c. 62 (c. 35, s. 11, in Ruffhead) ; 8 Geo. II. c. 6, s. 12 ; Taylor, Evidence, § 1464.

Act, 1884, the registrar is also required to seal the certificate with the seal of the registry (*x*).

Seisin :—provable on sales by extracts from the land tax or poor rate assessments showing who were the landlords and tenants of the property assessed, or by evidence of acts of ownership, as the grant of a lease under which possession was had, or any letting followed by payment of rent and *à fortiori* a sale or mortgage (*y*). Declarations of deceased occupiers that they held as tenants of another, being against their proprietary interest (*z*), are admissible as evidence of that other's seisin (*a*) ; and on this ground receipts for rent paid by a deceased person as tenant are evidence of the landlord's seisin, when produced from the proper custody (*b*). Proof of personal occupation only, though *primâ facie* evidence in ejectment of a seisin in fee, is not acceptable as sufficient evidence of seisin on a sale (*c*). Seisin.

Will :—proved on a sale by production of the probate or an office copy, whether the will relate to personal estate only or to real and personal estate, or, where the testator died on or after the 1st of January, 1898, to real estate only (*d*). If the will should not have Will.

(*x*) Stat. 47 & 48 Vict. c. 54, s. 9.

(*y*) Burt. Comp. pl. 418—436 ; Coventry, Conveyancers' Evidence, 275, 276 ; *Welcome v. Upton*, 6 M. & W. 536, 540, 542. The production from the proper custody, that is, the landlord's, of a lease expired at a time beyond living memory is sufficient evidence of seisin, without proof of enjoyment thereunder ; *Clarkson* v. *Woodhouse*, 5 T. R. 412, n.

(*z*) Above, p. 111.

(*a*) *Doe* d. *Daniel* v. *Coulthred*, 7 A. & E. 235, 239 ; *Doe* d. *Welsh* v. *Langfield*, 16 M. & W. 497, 514 ; Taylor, Evidence, § 618.

(*b*) Burt. Comp. pl. 429.

(*c*) Hubback, Evidence, 131 ; 1 Dart, V. & P. 379 ; above, p. 85.

(*d*) Coventry, Conveyancers' Evidence, 91, 93 ; Sug. V. & P. 414 ; 1 Dart, V. & P. 362. At common law, the probate copy of a will of personalty was conclusive evidence of the contents of the will ; *Allen* v. *Dundas*, 3 T. R. 125 ; but to prove a devise of real estate, production of the original will (whether proved or not) was required. The probate of a will is now admissible as evidence of a devise of real estate under the conditions specified in stat. 20 & 21 Vict. c. 77. ss. 62, 64, 65 ; Taylor, Evidence, §§ 1565A, B, and C ; *Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612.

been proved—and a will of real estate, as such, does not require to be proved (*e*)—the original must of course be produced (*f*). As in the case of deeds (*g*), it was not the practice on sales to require proof of the due signature and attestation of any will of real estate forming part of the title: but wills purporting to have been signed and attested as required by law (*h*) were presumed to have been made with the proper formalities (*i*). Since the Wills Act required all wills, whether of real or personal estate to be executed in the same manner (*j*), the fact that a will has been proved strengthens the presumption that it was duly signed and attested (*k*).

(*e*) Originally there was no jurisdiction to grant probate of a will dealing only with real estate; 1 Wms. Exors. pt. i. bk. iv. ch. ii. § 9, p. 389, 7th ed.; *In the Goods of Tomlinson*, 6 P. D. 209; *In the Goods of Hornbuckle*, 15 P. D. 149. But by the Land Transfer Act, 1897, stat. 60 & 61 Vict. c. 65, s. 1, probate may be granted in respect of real estate only where the testator has died on or after the 1st January, 1898.

(*f*) Sug. V. & P. 414.

(*g*) Above, pp. 97-99.

(*h*) See Wms. Real Prop. 228, 17th ed.

(*i*) Coventry, Conveyancers' Evidence, 91, 93—95.

(*j*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 9; see Wms. Pers. Prop. 408, 409, 14th ed.

(*k*) As to the evidence required on probate, see 1 Wms. Exors. pt. i. bk. iv. ch. ii. § 3; Wms. Pers. Prop. 420, 421, 14th ed.

CHAPTER V.

OF ADVISING ON TITLE GENERALLY.

In the preceding chapter we endeavoured to give a general view of the vendor's obligation to show a good title and its discharge. We will now consider the same subject from the point of view of a conveyancer instructed to advise the purchaser whether the title shown by the vendor can be accepted.

Duty of conveyancer advising the purchaser on title.

The first duty of a conveyancer so instructed is of course to read the contract for sale, and then to peruse the abstract of title with reference to the contract. And his task is to ascertain whether the vendor has shown a good title according to the contract, that is, such a title as the contract binds the purchaser to accept, taking into account in the case of a contract other than an open contract the limitations or restrictions thereby imposed on the purchaser's rights as defined by law. He has to satisfy himself that on all points, save those on which the right to call for proof is precluded by the contract, the vendor has shown that he has the right to convey what he contracted to sell (*a*). If a freehold in fee were sold, the conveyancer must see that the purchaser will get both the legal and equitable estate in fee simple, free from all incumbrances, save those, if any, subject to which he contracted to take the land. If copyholds were bought, the purchaser's adviser must ascertain that his client will be duly admitted tenant on the rolls of such an estate as was sold. If the land sold were lease-

(*a*) Above, p. 75.

hold, the conveyancer must take care that the lease or term offered by the abstract corresponds at all points with that promised by the contract; the purchaser, as we have seen (*b*), being entitled to require a lease from the freeholder unless the contract distinctly specified an underlease as the subject of the sale, and not being obliged to accept a lease at covenants more stringent than those usually inserted in the kind of lease purchased, unless the existence of such covenants were brought to his notice by the contract (*c*).

What should be the general scope and result of the abstract.

Before discussing any of the details of an abstract examined on behalf of a purchaser, let us consider what should be its general scope and result. It should show title for the time prescribed by law or settled by special stipulation as sufficient to prove a good title, according to the nature of the property sold (*d*); it should commence with a good root of title and continue to deal with the whole legal and equitable estate in the land purchased (*e*); and it should end in showing that the vendor can convey or cause to be conveyed to the purchaser the whole estate contracted for in the land sold.

Vendor need not show the whole estate to be vested in himself, if he have the right to procure its conveyance.

But it is important to observe that it is not necessary for the vendor to show upon the abstract that the whole estate sold is vested in himself. It is sufficient if it appear that he has, or may obtain by acts of which the performance rests with himself alone, the right to convey or cause others to convey to the purchaser the estate sold; and if such a right be established, the abstract is complete, and it is considered a matter to be dealt with on the preparation of the conveyance rather than on the investigation of title for the vendor to obtain the concurrence of all other persons necessary to vest in the purchaser the whole legal and

(*b*) Above, p. 81, n. (*d*).

(*c*) *Reeve* v. *Berridge*, 20 Q. B. D. 523; *Re White and Smith's Contract*, 1896, 1 Ch. 637.

(*d*) Above, pp. 81 *sq.*

(*e*) Above, pp. 87 *sq.*

equitable estate which he contracted to buy (*f*). Thus it is of course sufficient if the abstract show that the vendor has a power of appointment or other power which will enable him to convey the estate sold. So if the land sold be vested in trustees holding on trust for the vendor absolutely, a good title is shown on the abstract; for the vendor is entitled in equity to direct them to convey as he will (*g*). And if the land sold be subject to mortgages, the vendor has none the less shown a good title on the abstract, provided that the mortgages be immediately redeemable by him. And this is the case even though the amount secured by the mortgages exceed that of the purchase money, or the mortgages affect other lands than those purchased; as it appears to be considered that, so long as the vendor has the right of redemption, it merely rests with him to exercise it, the mortgagees being bound to take the money secured, if all that is due be tendered, and to re-convey on such payment (*h*). Here we may notice that the general rule of equity, that a mortgagor must give six months' notice of his intention to pay off the mortgage (*i*), is no bar to the immediate exercise of the right of redemption; for the mortgagor is entitled to pay to the mortgagee six months' interest in advance in lieu of such notice (*j*). Any mortgage redeemable in accordance with this general rule may therefore be considered as immediately redeemable for the purposes of a sale of the mortgaged land. But it is of course quite a different thing if the land sold be subject to a mortgage, which is not to be called in or paid off during a certain term. In such

(*f*) See 8 Ves. 436; *Townsend* v. *Champernown*, 1 Y. & J. 449; Sug. V. & P. 217, 218, 349, 423—425; Dart, V. & P. 321—326, 1177 *sq.*

(*g*) Wms. Real Prop. 178, 19th ed.; *Kitchen* v. *Palmer*, 46 L. J. Ch. 611.

(*h*) *Townsend* v. *Champernown*, 1 Y. & J. 449; *Savory* v. *Underwood*, 23 L. T. O. S. 141; Sug. V. & P. 425; 1 Dart, V. & P. 323, 324.

(*i*) Wms. Real Prop. 543, 544, 19th ed.

(*j*) *Johnson* v. *Evans*, W. N. 1889, p. 95.

case the discharge of the incumbrance is not a matter resting with the mortgagor alone; as the mortgagee cannot be obliged to receive back his money during the term (*k*).

Distinction between showing a good title on the abstract and proving it.

The reader must bear in mind the distinction between showing a good title on the abstract and showing a good title in the sense of completely discharging the vendor's obligation to show or make a good title. That is a matter depending on proof, not mere statement of title, and is not accomplished until an abstract showing a good title has been duly verified by production of the proper evidence (*l*). Thus, although a good title is shown on the abstract, notwithstanding the existence of mortgages exceeding the amount of the purchase-money, the vendor cannot of course make a good title if he be unable to pay off such mortgages or procure the mortgagees to release their charges.

A good title then is shown on the abstract, if it appear that the vendor have an equitable right in the land sold, by virtue of which he is, or may by doing acts which are independent of others' consent, immediately become entitled to direct the conveyance to the purchaser of all the estate sold (*m*). And where a future day is fixed for completion of the contract, a good title is sufficiently shown on the abstract if it appear that the vendor will certainly have such an

(*k*) See *Esdaile* v. *Stephenson*, 6 Madd. 366; *Lewin* v. *Guest*, 1 Russ. 325; Sug. V. & P. 425; 1 Dart, V. & P. 324.

(*l*) See above, pp. 95 *sq.* In actions for specific performance of contracts for sale of land the usual inquiry directed as to title is whether a good title can be made to the property sold, and if so, when it was first shown that such good title could be made; Seton on Decrees, 2226, 6th ed. The inquiry when a good title was first shown relates to the time when it was first shown upon the face of the abstract; but the inquiry, whether a good title can be made, means whether the vendor can prove a good title by the usual evidence; *Parr* v. *Lovegrove*, 4 Drew. 170; 4 Jur. N. S. 600; Sug. V. & P. 424, 425.

(*m*) See note (*f*) to p. 131, above.

equitable right as above mentioned before the time fixed for completion, although he have not and cannot immediately procure such right (*n*). But it is otherwise if any part of the estate contracted for be outstanding in some person, whom the vendor has no right to direct to convey, and the vendor cannot procure such right without the other's consent. In such case a good title in the vendor is not shown. This may be illustrated, not only by the example already given of land subject to a mortgage not to be paid off during a certain term, but also by the instances of lands subject to dower, or a jointure rent-charge (*o*) or restrictive covenants (*p*), or lands, under which the mines and minerals are not the vendor's (*q*). *A fortiori*, the purchaser can object to the title, where it appears that the whole title is in some third person whose conveyance the vendor has no *right*, legal or equitable, to direct. Nor is the case altered by the fact that the vendor offers to procure the concurrence of such third person, and the latter is willing to give it; so long as the latter is under no obligation enforceable in a court of justice to convey according to the vendor's direction (*r*). On this point a recent case (*s*) is very instructive. Two persons sold land as trustees for sale. It appeared from the abstract that the trust for sale did not arise until after the death of a tenant for life, who was still living: but the vendors, on this objection being pointed out, offered to procure a conveyance from the tenant for life under the Settled Land Acts. This the purchaser declined; and the vendors endeavouring to

Good title not shown if any estate outstanding in one, whom the vendor has no right to direct to convey.

Re Bryant and Barningham's Contract.

(*n*) Dart, V. & P. 324; see *Noble* v. *Edwardes*, 5 Ch. D. 378; *Bellamy* v. *Debenham*, 1891, 1 Ch. 412.

(*o*) *Esdaile* v. *Stephenson*, 6 Madd. 366.

(*p*) *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159.

(*q*) *Bellamy* v. *Debenham*, 1891, 1 Ch. 412.

(*r*) *Lewin* v. *Guest*, 1 Russ. 325; *Forrer* v. *Nash*, 35 Beav. 167, 171; *Brewer* v. *Broadwood*, 22 Ch. D. 105.

(*s*) *Re Bryant and Barningham's Contract*, 44 Ch. D. 218; see also *Re Head's Trustees and Macdonald*, 45 Ch. D. 310.

oblige him to take this title in a vendor and purchaser summons, it was held that he was justified in his objection thereto. The court pointed out that the vendors themselves could make no title, having no immediate right to convey, and that the proposed conveyance could only be effectually secured by a new contract made with the tenant for life; an arrangement, into which the vendors had no right to require the purchaser to enter.

Purchaser must at once repudiate the contract if he wish to insist on the objection.

It appears however that if the purchaser propose to object to the title shown on the ground that the whole or some part of the estate contracted for in the land sold is outstanding in some person, whom the vendor has no right to direct to convey, he must insist on such objection at once, and must immediately repudiate the contract. If he require the vendor to remove the objection by obtaining the concurrence of the other person or persons entitled, or if he entertain (except without prejudice to his right to repudiate the contract) (*t*) any proposal made by the vendor so to remove the objection, he may lose his right to insist on the objection and may find himself obliged to perform the contract. For if the purchaser show himself willing to go on with the contract, the vendor may get in the outstanding interests, though they should amount to the whole title, and he will then be in a position to enforce the specific performance of the contract. And if in such case the vendor bring an action for that purpose, it will be no defence to allege that he could make no title by the time fixed for completion. For if the purchaser has continued to recognise the contract as binding, it will be sufficient to enable the vendor to enforce specific performance, if he can make a good title at the

(*t*) See *Morley* v. *Cook*, 2 Hare, 106, 115; 7 Jur. 79, 80.

hearing (*u*) or even when the result of the usual inquiry as to title is certified (*v*). Besides this, if the contract contain the usual stipulation enabling the vendor to rescind in case of insistence on an unwelcome requisition, and the purchaser negotiate with the view of obtaining the removal of an objection, which would have justified him in repudiating the contract at once, the purchaser runs the risk of the vendor's exercising his power to rescind and so escaping the liability of paying the purchaser's expenses as damages (*w*).

Requisitions as to the contents and manner of making the abstract.

We have already considered what documents of title the abstract should contain and the manner in which they ought to be abstracted (*x*). Any defects in these respects should of course be the subject of requisition. The purchaser's adviser must insist on being furnished with an abstract showing a complete chain of the conveyances or other documents dealing with the legal estate in the property purchased from the time of commencement of title down to that of the contract for sale. And whenever the abstract gives him notice of any equitable estate or interest in the premises, he must require the title to such estate or interest to be abstracted (*y*), and must see that the same has been ultimately got in or released or will be conveyed to the purchaser: unless, of course the circumstances are such that the concurrence of the beneficiaries is unnecessary, as upon an ordinary trust for sale. It is his further duty to ascertain that each of the abstracted conveyances is at all points complete, so that it really has in law the

(*u*) *Hoggart* v. *Scott*, 1 Russ. & My. 293; *Salisbury* v. *Hatcher*, 2 Y. & C. C. C. 54.

(*v*) *Eyston* v. *Simonds*, 1 Y. & C. C. C. 608; Fry, Sp. Perf. §§ 1366—9, pp. 607, 608, 3rd ed.; 580, 581, 4th ed.; 2 Dart, V. & P. 1178—1180; and see *Murrell* v. *Goodyear*, 1 De G. F. & J. 432.

(*w*) See *Re Deighton and Harris*, 1898, 1 Ch. 458; below, p. 148.

(*x*) Above, pp. 87—94.

(*y*) See above, pp. 90—92.

effect which it purports to have. Thus he must consider whether the conveying parties have due capacity to convey the estate assured; if so, whether they have used an instrument proper and words apt to carry out their intention; and then whether the instrument is duly executed or perfected as required by law. And if he observe any deficiency, he should call for its rectification. If a document be abstracted in an improper manner (as constantly happens) conveyancing counsel ought to require the vendor to furnish a proper abstract sufficient to enable him to exercise his own judgment as to the effect of the words actually used. He ought not to rest satisfied with a mere statement of the effect of any material clause or document; for the very purpose of laying the abstract before him is that he should give his opinion on the effect of the deeds. And if he accept statements of the effect of clauses where he ought to be informed of the exact words used and judge of their effect himself, he is really laying a duty, which he ought to perform in person, on the gentleman who examines the abstract with the deeds. Owing to the unskilled and slovenly way in which abstracts are now too often prepared, counsel have to bear this constantly in mind. What clauses ought to be abstracted in full and what may be properly passed over with a mere statement has been considered above (*z*). We will merely give one constantly recurring example of the duty we have been pointing out. A proviso for reconveyance in a mortgage deed is now often abstracted in these words—proviso for redemption. And such abstracting is constantly allowed to pass either without comment or with the remark that it is presumed that this proviso is in the usual form. That however is exactly the point on which counsel's opinion is desired. A proviso for reconveyance is the only clause in a mortgage deed

(*z*) Pp. 92—94.

which effectively shows what charge on the property is thereby created, and on what terms that charge is redeemable, and it is also a limitation of the equitable estate in the property subject to the charge. All these matters are material to the title, even though a subsequent reconveyance from mortgagee to mortgagor appear on the abstract (*a*). The proviso therefore should always be so abstracted as to enable the purchaser's counsel to judge for himself, from the exact words used, of its effect in these respects (*b*). And unless counsel insist on being furnished with such an abstract, he does not discharge his duty to his client.

Estate of grantee to uses.

Here the reader may be warned of a pitfall, which the writer has several times encountered in practice; namely, the omission, since the Conveyancing Act of

(*a*) Of course mortgages are usually redeemable on payment of principal and interest by the original mortgagor to the original mortgagee, when reconveyance is to be made to the mortgagor according to his former estate. But, since persons not named as parties to indentures have been allowed to take benefits thereunder (see Wms. Real Prop. 152, 19th ed.), there is nothing to prevent a proviso in a deed of mortgage between A. borrower and B. lender that on payment of principal and interest by A. to C., B. shall reconvey to D. in fee. In such case, if there were a subsequent reconveyance by B. to A. in fee on payment by A. to B., a purchaser acquiring title under these deeds would take with notice of the equities both of C. and D. This example is of course an extreme case; and the rule no doubt is that a mortgagor's equitable estate in the mortgaged lands shall not be altered by the terms of a proviso for redemption without a clear expression of an intention in that behalf (*Innes* v. *Jackson*, 16 Ves. 356; Co. Litt. 208 a, n. (1); *Stansfield* v. *Hallam*, 5 Jur. N. S. 1334; *Hastings* v. *Astley*, 30 Beav. 260; *Re Betton's Trust Estates*, L. R. 12 Eq. 553; *Re Byron's Settlement*, 1891, 3 Ch. 474): but such an intention may be clearly expressed in the proviso (see 16 Ves. 370, 371), and any variation in the limitation thereby made from the mortgagor's former estate raises a *question*, whether any alteration was intended; Davidson, Prec. Conv., vol. ii. pt. ii. pp. 38—43, 4th ed.

(*b*) See 1 Prest. Abst. 149, 2nd ed., where note that the author appears to be speaking of a proviso for redemption in the old form making void the conveyance to the mortgagee on repayment (see Davidson, Prec. Conv. vol. ii. pt. ii. p. 31, 4th ed.; 5 Bythewood & Jarm. Prec. Conv. 3rd ed. by Sweet, 544, 555), and that, according to the principles there laid down, it should always be shown, in abstracting a proviso for *reconveyance*, to whom the reconveyance is limited to be made.

1881 took effect (*b*), to limit an estate in fee simple to a grantee to uses in deeds intended to take effect under the Statute of Uses. The consequence of this omission is that such grantee takes an estate for life only (*c*), and the uses declared are executed by the statute or turned into legal estates (*d*) only during the life of the grantee to uses and no longer (*e*). Uses declared of the inheritance in such circumstances are of course, generally speaking, valid in equity and enforceable as trusts: but the legal fee remains in the grantor; and on a subsequent sale of the land by persons entitled under the uses, the purchaser must require the legal estate of inheritance to be conveyed to him by the original grantor, his heirs, executors, administrators or assigns.

Identity.

It is the duty of a conveyancer perusing an abstract on the purchaser's behalf to see that the vendor discharges his obligation of proving the identity of the property sold with that described in the various documents abstracted (*f*). The conveyancer must therefore carefully compare the abstracted parcels as he proceeds, and ascertain that the descriptions in the title deeds agree with each other and with the description in the contract. Where the abstracted descriptions wholly or partially fail to show the identity of the property comprised in the title deeds with that sold, further

(*b*) Such an omission was not previously common, as it was the regular practice to limit estates to all grantees *and their heirs*. The mistake has generally arisen where use has been made of the statutory limitation to a grantee *in fee simple;* and the draftsman has forgotten that it is equally necessary to limit the lands to the grantee to uses in fee simple as to assure by apt words an estate of inheritance to *cestui que use* intended to take the benefit of the conveyance.

(*c*) Wms. Real. Prop. 110, 19th ed.

(*d*) Ibid. 168—171.

(*e*) Dyer, 186 a; *Jenkins* v. *Young*, Cro. Car. 230; *Meredith* v. *Joans*, ib. 244; Sug. Pow. 149, 8th ed.; Williams on Settlements, 7.

(*f*) Above, pp. 28, 54; Sug. V. & P. 413.

evidence of identity should be required, notwithstanding that the purchaser may have bought subject to the usual condition as to such evidence (*g*). The identity of the property sold with that comprised in the title deeds is the most important link in the whole chain of proof of the vendor's title; without evidence of such identity, the most perfect title shown by the deeds proves nothing. Purchasers cannot therefore be advised to dispense with such evidence (where they are entitled to require it), on the ground that they must bear the expense of it, if not in the vendor's possession (*h*).

Calling for evidence of facts.

It is the duty of the purchaser's counsel or solicitor, besides seeing that the documents which ought to be abstracted are abstracted and are properly abstracted, to note all facts material to the title stated on or appearing from the abstract, and to require them to be proved by the usual conveyancing evidence. What this is, has been already sufficiently considered (*i*). But we may remark that, owing to the rule which now throws upon the purchaser the expense of procuring all evidence of title not in the vendor's possession (*j*), it is a convenient plan to frame requisitions calling for evidence of facts in the following form:—"Has the vendor any evidence of any kind in his possession of (*the death, marriage or other fact required to be proved*)? If so, he is required to produce such evidence. If not, purchaser reserves his right to call for the usual formal evidence of such (*fact*) at his own expense." As we have already pointed out (*k*), it is often material to a title to prove that some event has *not* happened. This should not be forgotten upon the perusal of the abstract; and the conveyancer should, in these cases, call for such evidence as he can require.

(*g*) See above, pp. 54, 60.
(*h*) See above, pp. 37, 108.
(*i*) Above, pp. 104 *sq.*
(*j*) Above, pp. 37, 108.
(*k*) Above, p. 104.

Death duties.

Another matter to be attended to on the perusal of the abstract is the incidence of the death duties. Whenever the death is stated of a person interested in the lands sold, it must be considered whether this death gave rise to a claim for legacy, succession, estate or settlement estate duty in such a manner that the duty will, if unpaid, remain a charge on the land; and if so, the receipts for duty payable must be required to be produced or the claim discharged. The subject of the death duties is more fully considered below (*l*).

Stamps.

It is not the practice for vendors to mark on the abstract what stamps are impressed on the various title deeds: but the purchaser's solicitor must ascertain this on the examination of the abstract with the deeds (*m*), and he should note in the margin of the abstract what stamps each abstracted document bears, or their absence, where a document required by law to be stamped is unstamped. If the abstract come to counsel after it has been compared with the deeds, he must of course consider whether all the abstracted documents appear to be rightly stamped. If he receive the abstract before the examination of the deeds, he should remind his client, in advising on the title, that it must be ascertained whether the abstracted documents are duly stamped. If any document, which ought to be stamped, be unstamped or insufficiently stamped, the vendor should be required to procure it to be properly stamped; which, as we have seen, he is bound to do at his own expense (*n*).

Inquiries respecting the property sold.

Besides the requisitions, properly so called, demanding the production of some particular piece of evidence to complete the title, it may be desirable for the purchaser's advisers to make certain inquiries of the vendor respecting the property sold. Thus if an estate be sold

(*l*) Chap. VII. Sect. 2. (*m*) Above, p. 115. (*n*) Above, p. 103.

under the usual condition that it is sold subject to all subsisting chief rents, easements, tenancies and tenants' claims, whether mentioned in the particulars of sale or not (*o*), inquiry should be made of the vendor whether there are any such rents, easements, tenancies or claims. This is a very pertinent question; for, if it be omitted, the purchaser will have notice of any rights which he might have discovered by the inquiry (*p*); and, as we have seen, it is held that this general condition does not enable the vendor to enforce the contract specifically, if the property be subject to any rents, easements, tenancies or claims, which are serious incumbrances and were known to the vendor but omitted from the particulars (*q*). Again, it may be asked what outgoings there are in respect of the property sold. Land tax and tithe rentcharge, being general liabilities to which all lands are regularly subject, need not be expressly mentioned on a contract to sell land; it is understood that the purchaser will take subject to these liabilities, which are not regarded as incumbrances (*r*). And it is of course unnecessary to mention that the purchaser will have to pay the usual local rates, or property tax. If there be no other outgoings than these, the purchaser has no cause for objection: but the existence of rents or rentcharges (other than tithe rentcharge) not disclosed by the contract is a different matter. Quit rents, being incidents of tenure, are regarded in equity as a proper subject for compensation, not as a ground for resisting specific performance; and so are rentcharges of trifling amount (*s*). But the existence of a rentcharge of

(*o*) Above, p. 60.

(*p*) *Re Alms Corn Charity*, 1901, 2 Ch. 750.

(*q*) *Heywood* v. *Mallalieu*, 25 Ch. D. 357; *Nottingham Patent Brick & Tile Co.* v. *Butler*, 16 Q. B. D. 778; above, p. 61, n. (*w*).

(*r*) Sug. V. & P. 322; 1 Dart, V. & P. 398, 399. If land be sold free of land tax or tithe rentcharge, the case is of course different; as the vendor must then prove that the land is, as alleged, free from such liability; see ibid.

(*s*) *Esdaile* v. *Stephenson*, 1 S. & S. 122; Sug. V. & P. 312; 2 Dart, V. & P. 1205; see above, p. 36.

substantial amount is an objection to the title (*t*); as is the existence of a considerable ground rent not mentioned in the particulars on the sale of houses held for a long term of years (*u*). Another inquiry useful to be made is whether the property sold is subject to any drainage or land improvement or other statutory charge. Drainage and land improvement charges of course principally affect agricultural land: but it must be remembered that land once occupied for cultivation, is often built over, and that such charges may subsist after the agricultural aspect of the property has quite disappeared. And rentcharges may now be created under the Improvement of Land Act, 1864, and its amending Acts (*x*) for a very wide range of improvements, not exclusively affecting agricultural land. Agricultural land may also be liable to charges created under the Agricultural Holdings Act, 1883 (*y*). In the case of town property or building land, charges may arise under Local Management or Improvement Acts, the Public Health Act, 1875, or the Private Street Works Act, 1892, for the expenses of paving, sewering, lighting or other works ordered to be done by the proper authority. In these cases, therefore, inquiry should be made whether any demand has been made, notice given, or resolution passed, which may subject the property sold to any such charge (*z*). As we have seen, such charges, if attaching on the property sold before the time for completion, come under the head of outgoings which the vendor ought to discharge (*a*). And with regard to charges, generally, the rule of course applies that the purchaser is entitled to have the property sold free from

(*t*) *Portman* v. *Mill*, 1 Russ. & My. 696; *Re Great Northern Rail. Co. and Sanderson*, 25 Ch. D. 788; Sug. V. & P. 313; above, p. 133.

(*u*) *Jones* v. *Rimmer*, 14 Ch. D. 588.

(*x*) See Ch. XII. Sect. 2, below.

(*y*) Stat. 46 & 47 Vict. c. 61, ss. 29—32.

(*z*) See *Re Leyland and Taylor's Contract*, 1900, 2 Ch. 625; below, Ch. XII. Sect. 2.

(*a*) See cases cited in note (*m*) to p. 41, above; below, Ch. XI. Sect. 1.

all incumbrances, except those, if any, subject to which he agreed to buy (*b*).

Vendor bound to answer all relevant questions.

Re Ford and Hill.

The general rule applicable to inquiries of the above nature is that the vendor is bound to answer all relevant questions with respect to the property sold (*c*): but the limits of inquiry are shown in the case of *Re Ford and Hill* (*d*) already mentioned. It was there held that a vendor need not answer the inquiry, Is there, to the knowledge of the vendor or his solicitor, any settlement, deed, fact, omission, or any incumbrance affecting the property not disclosed by the abstract? This question the Court of Appeal held to be not so much a requisition as a searching interrogatory. As we have already pointed out (*e*), there is a clear distinction between putting questions to ascertain that the title shown on the abstract is fully proved and at all points complete, and interrogating the vendor whether he knows of any matter of title besides those stated on the abstract. Having regard to the practice already stated (*f*) of not disclosing purely equitable charges or interests on the abstract, where the purchaser may acquire a good title without notice of them, it seems obvious that such an interrogatory is objectionable. But it is thought that the decision in *Re Ford and Hill* does not go further than this, and does not exonerate the vendor from the obligation of answering questions relevant to the issue between the parties, which is, has the vendor *proved* the title, which he has *shown on the abstract* (*g*).

Counsel advising on title.

When the abstract is laid before counsel to advise thereon, he settles the necessary requisitions, and writes his opinion on the title according to the circumstances of the case; as that, if the requisitions be satisfactorily

(*b*) Above, pp. 34, 75.
(*c*) Above, p. 107.
(*d*) 10 Ch. D. 365.
(*e*) Above, p. 107, n. (*g*).
(*f*) Above, p. 90.
(*g*) See above, p. 132.

answered, a good title according to the contract will have been shown, or that some irremovable objection to the title appears. At the same time he usually advises what searches ought to be made. The subject of searches is reserved for subsequent consideration (*h*).

Searches.

Time for making requisitions.

As we have seen (*i*), it is usually stipulated that the purchaser's requisitions on or objections to the title shall be sent in within a specified time after the delivery of the abstract, that in this respect time shall be of the essence of the contract, and that in default of any requisitions or objections so made, the purchaser shall be taken to have accepted the title. The time so limited only begins to run from the delivery of a perfect abstract (*j*). But if the abstract delivered be in accordance with the contract, the purchaser must be careful to send in his requisitions or objections within the time appointed, or he will lose his right to insist upon them (*k*). If, however, the abstract delivered show no title at all on the face of it, the purchaser may take this objection at any time, notwithstanding any such stipulation as the above, and although the day fixed for sending in requisitions be past. Thus in *Want* v. *Stallibrass* (*l*), two persons entered into a contract to sell land, stipulating that all objections and requisitions not sent in within fourteen days after the delivery of the abstract should be considered as waived. They then delivered an abstract from which it appeared that they were trustees of the property sold for a third person for life and after his death for sale; and they offered the concurrence of the tenant for life, apparently supposing that this would enable them to make a good title. The purchaser, after the fourteen days had

Want v. *Stallibrass.*

(*h*) See below, Ch. XII. Sect. 2.
(*i*) Above, p. 51.
(*j*) Above, p. 52.
(*k*) See *Oakden* v. *Pike*, 34 L. J. (N. S.) Ch. 620; *Rosenberg* v. *Cook*, 8 Q. B. D. 162; *Pryce-Jones* v. *Williams*, 1902, 2 Ch. 517.
(*l*) L. R. 8 Ex. 175.

expired, took the objection that, as the trust for sale did not arise until the death of the tenant for life, it was not presently exercisable, even with the tenant-for-life's concurrence (*m*). And it was held by the Court of Exchequer that the purchaser was entitled to recover his deposit, as the above-mentioned stipulation did not exonerate the vendors from their obligation of showing a good title, and it was apparent on the face of the abstract delivered by them that they had failed to perform this obligation. So in *Re Tanqueray-Willaume and Landau* (*n*), two persons sold land under the usual condition limiting the time for sending in requisitions or objections, and offered to make title as executors and trustees of a will selling under the power of sale implied by the testator's debts being charged on his real estate (*o*). After the time so limited had expired the purchaser took the objection that the words of the will did not create such a charge of debts. And it was held both by Kay, J., and the Court of Appeal that it was not too late to raise this objection, because (as they said) it "went to the root of the title." In other words, it was an objection that the vendors had failed on the face of their own abstract to show any title at all. It also appears that objection to anything, which is a matter of conveyance rather than of title (*p*), may well be made after the time limited for sending in requisitions on title has expired. Thus where the abstract shows a title in the vendor, subject to mortgages, the purchaser can of course require the mortgagees to concur in the conveyance, although he may not have sent in any requisition to that effect within the appointed time. For, as we have seen (*q*), a vendor is considered to have shown an acceptable title, if it appear from the abstract that on doing certain acts, which he can perform

Re Tanqueray-Willaume and Landau.

(*m*) Above, p. 133.
(*n*) 20 Ch. D. 465.
(*o*) Wms. Real Prop. 253, 19th ed.
(*p*) See above, p. 130; *Denny* v. *Hancock*, L. R. 6 Ch. 1, 8, 9, 13; 1 Dart, V. & P. 494.
(*q*) Above, pp. 130—132.

immediately and independently of others' consent, he will have the right to direct the conveyance of the whole estate contracted for. But by his own showing he has no good title except he do such acts. It is therefore a matter of course that he shall perform them; and it is unnecessary for the purchaser to address any requisition to this point (*r*). But it is of course the better plan to take any objection to the title in the manner and within the time prescribed by the contract, even though the objection be an absolute failure to show title on the face of the abstract (*s*). And it is also desirable to include in the requisitions to be sent in within the time limited a demand for the concurrence in the conveyance of any mortgagees or other incumbrancers whose charges are redeemable (*t*). If the abstract show a good holding title, the purchaser cannot insist, after the time limited for sending in requisitions is gone by, on any objection thereto, which he might otherwise have taken (*tt*).

What requisitions should be made and insisted on.

The conveyancer should, as a rule, be guided, in making requisitions on title, by the countenance he expects his contention to receive from the Court in proceedings either to enforce specific performance or to recover the deposit (*u*). He should therefore make no frivolous or unnecessary requisitions (*v*), and he should be chary of asking for anything which he considers the other party not bound to concede. There are, of course, occasions when such requests may be properly made, and will be answered out of courtesy; and on making requisitions in the first instance it is legitimate to ask

(*r*) *Re Gloag and Miller's Contract*, 23 Ch. D. 320, 327.

(*s*) See above, p. 134, as to the danger of waiting before taking objection to the title.

(*t*) 1 Dart, V. & P. 494. See above, p. 134, as to requiring the concurrence of any person, whose interest is not redeemable without his consent.

(*tt*) *Pryce-Jones* v. *Williams*, 1902, 2 Ch. 517. As to the limits of the rule in *Want* v. *Stallibrass*, see L. Q. R. xix. 161.

(*u*) Above, p. 30.

(*v*) 1 Dart, V. & P. 493.

for what it is desirable that the purchaser should have (unless the requisition be plainly prohibited by the contract), although the vendor be not in strictness bound to comply. But if any requisition be met with a refusal, then the purchaser should not insist upon it, if he does not expect that his contention will be upheld by the Court.

Where the vendor may rescind.

If the contract contain the common stipulation allowing the vendor to rescind the contract, if the purchaser insist on any requisition which the former is unwilling to remove or comply with (*w*), extra care must be exercised in selecting the requisitions which are to be pressed; and a conveyancer acting on behalf of a willing purchaser should only maintain his objections on points essential to the title. This is especially the case, where the stipulation is in the old common form giving the vendor the right to rescind, when the purchaser has insisted on an unwelcome requisition, without allowing to the latter any opportunity of withdrawing the requisition (*x*). For, as we have seen (*y*), the Courts are now inclined to allow a vendor to exercise a right of rescission according to the letter of the stipulation reserving it, provided only that he do so reasonably and in good faith and not capriciously; and he is not obliged to inform the purchaser of his reason for rescinding. And if the condition do not give the purchaser the option of withdrawing the objection, on which he has insisted, the vendor may rescind without offering the purchaser any opportunity of retracting, and the latter cannot recover his rights under the contract by abandoning the objection after he has received the notice to rescind (*z*). Where the condition gives

(*w*) Above, p. 54.

(*x*) 1 Davidson, Prec. Conv. 564, 614, 4th ed.; 469, 522, 5th ed.; 1 Key & Elphinstone, Prec. Conv. 233, 234, 2nd ed.

(*y*) See above, p. 54, and cases cited in note (*n*) thereto.

(*z*) *Duddell* v. *Simpson*, L. R. 2 Ch. 102, 107, 108; *Re Dames & Wood*, 29 Ch. D. 626.

the right of rescission on an unwelcome requisition being *made* (not *insisted on*), the purchaser is in an even worse plight, as this gives the vendor the opportunity of rescinding on the first delivery of such a requisition (*a*); which he would not have if the condition of rescinding were that the purchaser should insist on the requisition (*b*). As we have seen (*c*), such conditions are now frequently drawn so as to allow the purchaser to withdraw the requisition within a limited time after he has received notice of intention to rescind; and when this is the case, there is no reason why requisitions, which are thought needful, should not be pressed, so long as notice to rescind is not given.

Where the vendor has no title.

It has been held that a vendor, who has no title at all, cannot take advantage of a stipulation in the usual form enabling him to rescind, so as to escape the liability of paying the purchaser's expenses as damages (*d*). But this doctrine was not applied where a vendor having a beneficial interest, but not the entire legal title, sold in good faith, and a troublesome requisition to get in the outstanding legal estate was insisted on; notwithstanding that the defect of title appears to have been such as would have justified the purchaser in repudiating the contract at once on the ground that the vendor had failed to show a good title on the face of his own abstract (*e*). And where a purchaser claimed to repudiate the contract unless the vendor removed an

(*a*) *Re Starr Bowkett Bdg. Socy. and Sibun's Contract*, 42 Ch. D. 375.

(*b*) *Greaves* v. *Wilson*, 25 Beav. 290, 295, and cases cited in the two previous notes.

(*c*) Above, pp. 54, 60.

(*d*) *Bowman* v. *Hyland*, 8 Ch. D. 588; see above, p. 134; *Re Jackson & Hawkins and Lord Petre's Contract*, 1897, 1 Ch. 90.

(*e*) *Re Deighton and Harris's Contract*, 1898, 1 Ch. 458. The vendor had sold a lease, and the abstract only showed title to an equitable interest in an underlease (see above, pp. 81, n. (*d*), 130). It should be noted that the purchaser did not at once repudiate the contract on this ground; he negotiated, requiring the objection to be removed and so treated the contract as still subsisting; see above, pp. 134, 135. The Court moreover treated the objection as relating to a matter of conveyance, not of title. See also *Heppenstall* v. *Hose*, 33 W. R. 30.

objection, which the Court afterwards held to be untenable, it was considered that the vendor was entitled to rescind the contract on the objection being pressed (*f*). But if the vendor fail to show a good title on the face of his own abstract and the purchaser at once repudiate the contract on this ground, it seems questionable whether the vendor can then take advantage of a clause in the contract reserving the right to rescind, and so save his liability to pay the purchaser's expenses as damages. For when the vendor has so failed to perform his contract, and the purchaser has at once elected to treat the contract as broken, can the former any longer claim to exercise a right given by the contract itself? It appears that for a vendor of land to fail to show a good title thereto is such a breach of contract as discharges the purchaser from the necessity of performing his part of the agreement (*g*). Besides, it may be doubted whether a case like this, in which the purchaser does not insist that the vendor shall remove any objection or comply with any requisition, falls within the terms of the usual stipulation (*h*).

Objection as to matter of conveyance.

If the stipulation gives the right to rescind in case of insistence on a requisition or objection as to *title* only, the vendor will not be enabled to rescind if the purchaser insist on some requirement, which is a matter of conveyance, as the discharge of a mortgage (*i*). But it has long been usual expressly to extend the right to rescind to the case of objections as to matters of conveyance, and generally to objection in regard to any

(*f*) *Isaacs* v. *Towell*, 1898, 2 Ch. 285.

(*g*) *Duke of St. Albans* v. *Shore*, 1 H. Bl. 270, 278; *Seaward* v. *Willock*, 5 East, 198, 202; *Souter* v. *Drake*, 5 B. & Ad. 992; *Ellis* v. *Rogers*, 29 Ch. D. 661; 2 Dart, V. & P. 1086; and see above, pp. 27, n., 144, 145; L. Q. R. xix. 168—171.

(*h*) See *Bowman* v. *Hyland*, 8 Ch. D. 588.

(*i*) *Re Jackson and Oakshott*, 14 Ch. D. 851; see above, pp. 130, 131.

matter relating to the sale (*j*); and where the contract is so expressed, the Court will give effect to it (*k*). The usual condition expressly empowers the vendor to rescind, notwithstanding any negotiation or litigation in respect of the objection or requisition insisted on (*l*). Such negotiation on the vendor's part is therefore no waiver of his right to rescind (*m*). And the vendor is enabled to rescind, although the condition contain no reference to pending litigation, during the continuance of any proceedings by the purchaser either for specific performance or to enforce the contract at law, and whether by action or vendor and purchaser summons (*n*): but not after final judgment has been given in any such proceedings (*o*). If the vendor take proceedings to enforce the contract at law or in equity, he waives his right to rescind: though he may revert to it, if he procure his proceedings to be effectually discontinued at his own cost before they come on to be heard (*p*).

Waiver of objections or requisitions.

A purchaser may of course waive any objection or requisition which he has taken or made as to title or otherwise. Such waiver may be either express or implied from any acts or conduct inconsistent with the maintenance of the objection (*q*). The express waiver of an objection or requisition needs no comment: though it may be observed that the acceptance of the title shown by the abstract is no waiver of the right to require the

(*j*) 1 Dart, V. & P. 160, 5th ed.; 1 Davidson, Prec. Conv. 564, 614, 4th ed.

(*k*) *Re Deighton and Harris's Contract*, 1898, 1 Ch. 458.

(*l*) Above, p. 60.

(*m*) *Duddell* v. *Simpson*, L. R. 2 Ch. 102; 1 Davidson, Prec. Conv. 564, 4th ed., 470, 5th ed.; 1 Dart, V. & P. 183, 184.

(*n*) *Hay* v. *Smithies*, 22 Beav. 510; *Duddell* v. *Simpson*, L. R. 2 Ch. 102; *Isaacs* v. *Towell*, 1898, 2 Ch. 285. But the condition does not oust the jurisdiction of the Court to order the vendor to pay the costs of any such proceedings; *Re Spindler and Mear's Contract*, 1901, 1 Ch. 908.

(*o*) *Re Arbib and Class's Contract*, 1891, 1 Ch. 601.

(*p*) *Warde* v. *Dickson*, 5 Jur. N. S. 698; *Gray* v. *Fowler*, L. R. 8 Ex. 249; and see the case cited in the previous note, where the original summons was taken out by the vendor.

(*q*) See *Simpson* v. *Sadd*, 4 De G. M. & G. 665; Sug. V. & P. 342 *sq.*; 1 Dart, V. & P. 495 *sq.*

verification of the abstract (*r*), or of any objection not disclosed by the abstract (*s*). Whether the waiver of any objection is to be implied from the purchaser's acts is a question of fact to be determined by the consideration of all the circumstances of the case (*t*). The evidence usually offered to establish an implied waiver is the performance, without raising any objection, of acts which the purchaser is not bound to perform, or which a prudent purchaser does not usually perform until a good title has been duly proved (*u*); like entry into possession, or payment of the whole or part of the purchase money (*v*). With regard to taking possession, if the contract for sale expressly or impliedly provide that the purchaser shall be let into possession before completion, no waiver can be implied from the fact of the purchaser so taking possession (*w*). And so it is if after the contract the parties agree that the purchaser shall go into possession without prejudice to his right to require a good title (*x*). But if the purchaser take possession, otherwise than under an express provision in the contract, after an abstract of title has been delivered, but before completion, that is *primâ facie* a waiver of all objections to title (*y*) appearing on the abstract (*z*), though not of other objections (*a*). Waiver of objection may also be implied from the purchaser's conduct, though he were in possession when he bought, or took possession before completion under an express provision

(*r*) *Southby* v. *Hutt*, 2 My. & Cr. 207.

(*s*) *Blacklow* v. *Laws*, 2 Hare, 40, 47; Alderson, B., *Att.-Gen.* v. *Sitwell*, 1 Y. & C. 570.

(*t*) *Burroughs* v. *Oakley*, 3 Swanst. 159, 168.

(*u*) Above, pp. 37, 38.

(*v*) See the cases cited in the following notes; *Haydon* v. *Bell*, 1 Beav. 337.

(*w*) *Dixon* v. *Astley*, 1 Mer. 133, 134; *Stevens* v. *Guppy*, 3 Russ. 171, 183; *Bolton* v. *London School Board*, 7 Ch. D. 766.

(*x*) See *Burroughs* v. *Oakley*, 3 Swanst. 159, 169.

(*y*) But not of objections, which are matter of conveyance (above, p. 130), as that the vendor shall release the property from mortgages; *Re Gloag and Miller's Contract*, 23 Ch. D. 320, 327.

(*z*) *Burnell* v. *Brown*, 1 J. & W. 168; *Bown* v. *Stenson*, 24 Beav. 631, 637.

(*a*) *Turquand* v. *Rhodes*, 37 L. J. Ch. 830.

in the contract or without prejudice to his right to a good title; as if he remain a long time without raising any objection as to title, and exercise decisive acts of ownership over the lands sold, like letting them, making alterations in buildings or cutting timber, or accept time in regard to payment of the purchase money (*b*), or remain in possession after having had notice of an irremovable objection to the title (*c*). But as has been observed, in each case the whole of the circumstances must be considered, so that entry into possession or exercise of acts of ownership is by no means conclusive evidence of waiver. The question is, whether the purchaser intended to waive the particular objection. Such acts therefore are no evidence of waiver if accompanied by insistence on the objection. Thus where negotiations as to title were continued after the purchaser had both taken possession and acted as owner it was held that no waiver of objections to title could be implied (*d*). Long delay in raising objections may also be evidence of waiver (*e*).

Purchaser desiring to go on where the abstract shows an objection to the title.

Where the abstract shows an objection to the title which would justify the purchaser in rescinding the contract, but he desires to complete the sale, if possible, he should at once claim that he is entitled to treat the contract as broken and recover his deposit and expenses, but state that, subject and without prejudice to his strict rights in this respect, he is willing to go on with the sale, if the objection can be removed, and make requisitions accordingly. It is thought that if he so reserve his rights, the vendor cannot rescind under the common condition, if any requisition so made prove unwelcome (*f*).

(*b*) See *Fleetwood* v. *Green*, 15 Ves. 594; *Dixon* v. *Astley*, 1 Mer. 133; *Margravine of Anspach* v. *Noel*, 1 Madd. 310.

(*c*) *Re Gloag and Miller's Contract*, 23 Ch. D. 320.

(*d*) *Burroughs* v. *Oakley*, 3 Swanst. 159, 169, 171.

(*e*) *Pegg* v. *Wisden*, 16 Beav. 239.

(*f*) See above, pp. 30, 31, 133—135, 148, 149.

CHAPTER VI.

OF STIPULATIONS LIMITING THE OBLIGATION TO SHOW A GOOD TITLE.

We will now turn our attention to various particular points, which constantly arise in advising on title. And first, as to the effect of stipulations limiting the vendor's obligation to show a good title. We will begin by remarking that the enactment substituting forty years for sixty, in the absence of stipulation to the contrary, as the time of commencement of title (*a*) appears to alter the rule of law on this point rather than to introduce into open contracts a new term depending for its efficacy on the contracting parties' consent. So that where a vendor shows forty years' title, he is considered to show title for the full period required by law, and the purchaser's rights are not regarded as being limited by special stipulation (*b*). But the other statutory limitations of the purchaser's right to require a good title do not appear to have the like effect. Thus the enactment in the Vendor and Purchaser Act, 1874 (*c*), removing the necessity of showing the freeholder's title on the grant or assignment of a lease, has been held to have no greater force than a special stipulation in the contract to the same effect, and so not to exempt the grantee or assignee of the lease from receiving constructive notice of the lessor's title (*d*). And, as we shall see,

The statutory limitations.

(*a*) Stat. 37 & 38 Vict. c. 78, s. 1; above, pp. 79, 80.

(*b*) See *Re Marsh and Earl Granville*, 24 Ch. D. 11; above, p. 81; *Re Cox and Neve's Contract*, 1891, 2 Ch. 109, 117, 118.

(*c*) Stat. 37 & 38 Vict. c. 7, s. 2 (rule 1); above, pp. 80—82.

(*d*) *Patman* v. *Harland*, 17 Ch. D. 353, 359.

the provisions of the Conveyancing Act of 1881 (*e*), exonerating the vendor of lands held by underlease less than forty years old from the obligation of showing the title to any leasehold reversion, and relieving a vendor of enfranchised copyholds of the necessity of showing the title to make the enfranchisement, receive the same construction as special stipulations in similar terms. The rule fixing forty years before the date of the contract as the time of commencement of title is, as we have seen (*f*), very frequently superseded in practice by a special stipulation that the title shall commence with some instrument of more recent date. But whether the period for which title has to be shown be defined by the general rule or by special stipulation, the vendor's obligation is subject to the further limitation introduced into contracts for sale by sect. 3, sub-sect. 3 of the Conveyancing Act, 1881 (*g*). This enactment, the exact effect of which it is of the first importance to understand, runs as follows :—

Sect. 3 (3) of Conveyancing Act, 1881.

"A purchaser of any property shall not require the production, or any abstract, or copy, of any deed, will, or other document dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document,

(*e*) Stat. 44 & 45 Vict. c. 41, s. 3 (1, 2); above, pp. 80—82.

(*f*) Above, pp. 15, 16, 67.

(*g*) Stat. 44 & 45 Vict. c. 41.

forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment or otherwise."

The incorporation or exclusion of these provisions in or from the contract is, however, a matter depending on the expression of the intention of the parties (*h*). And it is enacted (*i*) that nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section or any of them, specific performance of the contract would not be enforced against him by the Court. The statutory provisions therefore have no greater force than express stipulations to the same effect, and will receive the same construction as such stipulations (*j*). We have already noticed the manner in which special conditions of sale are construed in actions for specific performance (*k*). We will now show particularly in what manner the effect of the above provisions is practically limited, notwithstanding the sweeping character of the expressions used therein.

The effect of the above enactment.

The first observation to be made is that this enactment is no qualification of the main rule that the vendor must show a good title, that is, that he must prove his right to convey what he sold. It refers entirely to the subordinate rule that the title for the last forty years, or whatever less period may be agreed upon, shall *primâ facie* be evidence of a good title (*l*). If therefore the

(*h*) Sect. 3, sub-s. 9.
(*i*) Sect. 3, sub-s. 11.
(*j*) *Nottingham Patent Brick and Tile Co.* v. *Butler*, 15 Q. B. D. 261, 272; 16 Q. B. D. 778.
(*k*) Above, p. 31.
(*l*) Above, pp. 75—77.

title shown in accordance with the agreement be defective, as where it discloses incumbrances irremovable without other persons' consent (*m*), the purchaser is not precluded by the above enactment from objecting to the title, notwithstanding that the incumbrances were created before the time fixed for the commencement of title.

Phillips v. *Caldcleugh.*

The leading authority for this is *Phillips* v. *Caldcleugh* (*n*). In that case, the plaintiff contracted to purchase of the defendants a house described as a freehold residence, subject to certain conditions of sale, and paid a deposit. The 5th condition provided that the abstract of title to the property should commence with a conveyance dated the 17th of April, 1860, and no purchaser should investigate or take objection in respect of the title prior to the commencement of the abstract. By the deed of the 17th of April, 1860, as abstracted, the premises were conveyed to Matthews and Beckett in fee subject to the covenants and conditions contained in an indenture of the 2nd of March, 1850, recited therein. The plaintiff made this requisition—"The vendors must show, notwithstanding any of the conditions of sale, that the covenants and conditions contained in the indenture of the 2nd of March, 1850, referred to in the first abstracted deed, do not in any manner affect the property, and that the purchaser incurs no liability in respect of them." To which the defendants made answer, "The purchaser's solicitors are referred to the 5th condition of sale." After some fruitless negotiations the purchaser brought an action to recover his deposit. And it was held that he was entitled to recover it. For the plaintiff had contracted to purchase a freehold house, which must mean a freehold free from all incumbrances; and the abstract delivered only showed a title to a freehold house incumbered by certain covenants. And it was held

(*m*) Above, p. 133.

(*n*) L. R. 4 Q. B. 159.

that the 5th condition of sale did not prevent the purchaser from taking this objection: for it merely restricted the length of time for which the purchaser could require a title to be shown; and did not absolve the vendor from the obligation of showing a good title to the freehold of the property sold, free from incumbrances, from the time at which it had been agreed that the title should commence. It should be noted that this case was an action at law brought before the Judicature Acts, and in no way depended upon any of the equitable doctrines peculiar to the granting or refusing the specific performance of a contract (*o*). Again, in *Nottingham Patent Brick and Tile Co.* v. *Butler* (*p*), land was bought under a contract providing that the title should commence with an indenture dated the 20th of May, 1868, and incorporating the above enactment, and further providing that the property was sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not. The vendor's solicitor represented to the purchaser, before the contract was signed, that the property was not subject to restrictive covenants: but the purchaser, after having signed the contract, discovered from other sources than the vendor that there were restrictive covenants affecting the property and created by a title deed of earlier date than the 20th of May, 1868. He thereupon refused to complete, and brought an action to recover his deposit. The vendor counterclaimed the specific performance of the contract, and alleged in the Court of Appeal that he himself had bought without notice of the restrictive covenants, and so could give the purchaser an unincumbered title. The vendor was, however, aware of the existence of the covenants, having discovered them, as he said, by looking, after his purchase, at the deed creating them. It was held both by Wills, J. and the

Nottingham Patent Brick and Tile Co. v. *Butler.*

(*o*) Above, pp. 31, 32. (*p*) 15 Q. B. D. 261; 16 Q. B. D. 778.

Court of Appeal that the purchaser was not precluded by the above provisions of the Conveyancing Act from insisting on his right to an unincumbered freehold title. The vendor's claim for specific performance was rejected, not only on the ground of his solicitor's misrepresentation, but also because the vendor, knowing of the defect in the title, did not call the purchaser's attention thereto in the contract, and so could not avail himself of the special condition that the property was sold subject to anything affecting the same (*q*). His claim to oblige the purchaser to take a title from him as a *bonâ fide* purchaser for value without notice of the covenants was dismissed for the reason that the fact, that he was such a purchaser, was disputable, and Courts of Equity regard titles depending on proof of facts, which may be immediately disputed and so land the purchaser in litigation, as too doubtful to force upon an unwilling purchaser. The return of the deposit was also ordered in both Courts: but the Court of Appeal rested the purchaser's right to this relief entirely upon the misrepresentation by which he was induced to enter into the contract; without which the Court considered that he would have been bound at law by the contract. Another case illustrating the effect of the above enactment and depending on the same principle as the case last cited is *Re Marsh and Earl Granville* (*r*). It was there stipulated that the title to a certain freehold estate should commence with a deed less than forty years old. This deed turned out to be a voluntary conveyance: but no mention of this fact had appeared in the conditions of sale. It was held in a vendor and purchaser summons taken out by the vendor that the purchaser was justified in refusing to complete the contract, unless title were shown for the full period of forty years; notwithstanding that the conditions of sale provided

Re Marsh and Earl Granville.

(*q*) See above, pp. 61, n. (*w*), 141.

(*r*) 24 Ch. D. 11.

that the title earlier than the date of the voluntary conveyance should not be investigated or objected to. This was so decided on the ground that conditions curtailing a purchaser's right to require a good title as defined by law must be fair and explicit, or the vendor shall not enforce the specific performance of the contract according to the limiting conditions. And the Court further considered that, on a stipulation for the commencement of title with a deed *less* than forty years old, the purchaser is entitled to assume that the agreed root of title is a conveyance for valuable consideration. As we have seen (*s*), this judgment does not appear to oblige a vendor to put forward such a conveyance as the root of title when he agrees to show title for the full period required by law. In all other respects, however, the principles of *Phillips* v. *Caldcleugh* and *Re Marsh and Earl Granville* are constantly applicable whenever it is stipulated that title shall commence with an instrument of a particular date, whether that date be or be not less than forty years before the contract. And whenever such a deed fails in any of the requisites of a good root of title (*t*), the purchaser is entitled to call for further evidence to supply the defect; and he is not precluded by the above enactment from insisting on this right to further evidence, even though proof can only be supplied by the investigation of the earlier title. For as we have seen (*u*), the vendor's obligation is to show title to the whole estate contracted to be conveyed in the lands sold throughout the entire period of forty years or such less time as may be agreed on. He must therefore prove title to the whole of such estate at the beginning and thenceforward until the end of such period. Thus on the sale of freeholds he must prove a seisin in fee free from incumbrances at the commencement of and throughout the number of years

(*s*) Above, p. 89. (*t*) Above, p. 87. (*u*) Above, p. 87.

for which he has bound himself to show title; and he incurs a similar obligation on the sale of copyholds (*v*) or leaseholds (*w*).

Vendor disclosing a defect of title.

If a vendor of his own accord allow the purchaser to inspect title deeds of earlier date than the time agreed on for commencement of title, and the purchaser so discover a defect in the title, the latter may insist on such defect as a bar to specific performance, notwithstanding the provisions of the above enactment (*x*).

Misrepresentation.

Re Banister, Broad v. *Munton.*

Any misrepresentation as to facts, however innocently made, will preclude the vendor from enforcing the specific performance of the contract with the limitations imposed by the above enactment. On this point the leading case is now *Re Banister, Broad* v. *Munton* (*y*), where, upon the sale of a farm by order of the Court, a condition was made requiring the purchaser to assume that E. B. was seised of and entitled to the entire property sold in fee simple in possession, free from incumbrances, in 1835 and up to and at her death, stating that it was not known and could not be explained how E. B. acquired the property, and expressly stipulating that no other title than as above should be required or inquired into. It was shown that it was within the knowledge of the vendor that E. B. was not seised of the property free from incumbrances in 1835, and how E. B. acquired the property. The vendor was held to have acted in perfect good faith, inasmuch as he had furnished a statement of the facts known to him, upon which the condition had been drawn by one of the conveyancing counsel of the Court. But it was held that, the statement which the purchaser was required to

(*v*) *Selliek* v. *Trevor*, 11 M. & W. 722.

(*w*) *Waddell* v. *Wolfe*, L. R. 9 Q. B. 515.

(*x*) *Smith* v. *Robinson*, 13 Ch. D. 148.

(*y*) 12 Ch. D. 131; see also *Harnett* v. *Baker*, L. R. 20 Eq. 50.

assume as correct being untrue to the knowledge of the vendor, the former had been induced to make the contract by a misrepresentation; for he was entitled to presume that what was so stated was true. It was considered therefore that the vendor could not oblige the purchaser to take a title as limited by the condition, and the purchaser might decline specific performance unless the vendor would show a good title irrespective of the condition. But it was declared that the purchaser, having bought under such a condition, was entitled to require a good holding title only and not a good marketable title.

Construction of express stipulations before the Conveyancing Act, 1881.

The reader will observe that, as the above enactment has no greater force in binding either party than an express stipulation to the same effect, it is construed with the aid of decisions given before the Act upon the construction of contracts containing similar express provisions. In arriving at such decisions, the question generally considered was whether the terms of the contract simply exonerated the vendor from the obligation of showing or answering any requisition as to the title prior to some specified time (*e*), or whether they bound the purchaser to refrain altogether from investigating such prior title and so obliged him to accept the title shown without objection, even though a ground of objection were ascertained from other sources than the vendor (*f*). It appears from the above-mentioned case of *Nottingham Patent Brick and Tile Co.* v. *Butler* (*g*) that the stipulation made by sect. 3, sub-sect. 3, of the Conveyancing Act (*h*) does not bind the purchaser to refrain from investigating the earlier title in other

(*e*) *Shepherd* v. *Keatley*, 1 C. M. & R. 117; *Darlington* v. *Hamilton*, Kay, 550; *Waddell* v. *Wolfe*, L. R. 9 Q. B. 515.

(*f*) *Hume* v. *Bentley*, 5 De G. & Sm. 520; *Waddell* v. *Wolfe*, L. R. 9 Q. B. 515, 519; *Jones* v. *Clifford*, 3 Ch. D. 779, 790.

(*g*) 16 Q. B. D. 778; above, p. 157.

(*h*) Above, p. 154.

sources than the vendor; and special stipulation must be made, if such inquiry by the purchaser is intended to be precluded. The reader will have noticed, however, that this enactment expressly precludes objection as well as inquiry by the purchaser with regard to the earlier title; and it may be asked whether these expressions are absolutely without effect. They certainly do not preclude the purchaser from resisting specific performance on account of any objection to the title, which was known to the vendor when he made the contract, but not disclosed thereby (*i*). And, as we have seen (*j*), they do not, even at law, preclude a purchaser from objecting to a title subject to a present defect, which is apparent on the face of the abstract, though arising out of the earlier title. But if a good title were shown by the abstract for the time for which title was agreed to be shown, and there were no active misrepresentation on the vendor's part (*k*), it appears that a purchaser would not be allowed to rely upon an objection barred by the letter of the above enactment in proceedings to recover his deposit (*l*). And if the objection arising out of the earlier title were unknown to the vendor when he sold, the case is altogether different and is not covered by any of the authorities cited; and it must not be assumed, without argument, that in such circumstances the purchaser would not be precluded by the above enactment from resisting specific performance, if he discovered the objection elsewhere (*m*).

(*i*) *Nottingham Patent Brick and Tile Co.* v. *Butler*, 16 Q. B. D. 778, 786, 789.

(*j*) Above, p. 156.

(*k*) See above, p. 158.

(*l*) See above, pp. 32, 69, 70, and cases stated below, pp. 165—168.

(*m*) On this point see the writer's argument in his Conveyancing Statutes, Appendix A., p. 531, written before the case of *Nottingham, &c. Co.* v. *Butler*. The position there taken by the writer with regard to defects known to the vendor (p. 535, last sentence) is justified by the judgment of the C. A. in this case; 16 Q. B. D. 786, 789. As to the position of a vendor selling honestly and in good faith without knowledge of a defect in his title, see *Re Woods and Lewis's Contract*, 1898, 1 Ch. 433, 2 Ch. 211.

Special stipulation as to title.

It is of course open to any vendor by special stipulation either to exonerate himself altogether from the obligation of showing title or to bind the purchaser to accept any partial or defective title; and if such stipulations be fair and explicit, so that the purchaser cannot reasonably be misled with regard to the title he is contracting to take, they will be enforced by the Court in granting specific performance at the vendor's suit (*n*). Thus purchasers have been ordered to perform specifically contracts obliging them to take such title as the vendors had (*o*). Such a stipulation precludes objection to the vendor's title, but does not relieve him of the obligation of abstracting and verifying it (*o*). But a stipulation that the vendor shall not be required to show any title, whether to the whole or to any part of the lands sold, is undoubtedly valid, and exempts him from the necessity of abstracting or otherwise proving his title (*p*). As we have seen (*q*), however, the last-mentioned stipulation alone would not preclude objection to the title on account of a defect discovered from other sources; but if words were added obliging the purchaser to refrain from any independent investigation of the title, he would certainly be bound thereby, both at law and as regards the specific performance of the contract. On this point the leading authority is *Hume* v. *Bentley* (*r*), where leaseholds were sold under a condition that the lessor's title would not be shown and should not be inquired into (*s*). The vendor sued for specific performance, and on the usual reference (*t*) as to title, the purchaser took the objection that the lease,

Hume v. *Bentley.*

(*n*) Above, p. 51; see *Re Haedicke and Lipski's Contract*, 1901, 2 Ch. 666.

(*o*) *Freme* v. *Wright*, 4 Madd. 364; *Keyse* v. *Hayden*, 20 L. T. O. S. 244. See also *Wilmot* v. *Wilkinson*, 6 B. & C. 506; *Tweed* v. *Mills*, L. R. 1 C. P. 39; Sug. V. & P. 337; 1 Dart, V. & P. 168—170; 1 Davidson, Prec. Conv. 544, 4th ed.; Fry, Sp. Perf. § 1323, p. 591, 3rd ed.; p. 565, 4th ed.; Hume v Bentley

(*p*) See *Southby* v. *Hutt*, 2 My & Cr. 207, 212, 213.

(*q*) Above, p. 161.

(*r*) 5 De G. & Sm. 520; 16 Jur. 1109.

(*s*) See above, p. 161.

(*t*) Above, p. 132, n. (*l*).

which had been granted by a canal company, was void, as it appeared from the Acts of Parliament incorporating the company that the company had no power to acquire land or grant leases. It was held however that a vendor may lawfully stipulate that the purchaser shall accept the title shown without objection or inquiry; and that the words used amounted to such a stipulation and precluded the purchaser from looking into the lessor's title for any purpose. And the purchaser's objection was disallowed. As we have seen (*u*), when it is intended that the purchaser shall take lands sold subject to some particular defect of title known to the vendor, such as an easement, restrictive covenants, a mortgage or a rentcharge, the stipulation obliging him to do so must clearly call his attention to the incumbrance, to which he is to submit: otherwise he will not be bound to specific performance according to the letter of the contract. The cases to which we have referred upon considering the effect of sect. 3 (3) of the Conveyancing Act of 1881 (*v*) also illustrate the effect given at law and in equity to special stipulations as to title.

A purchaser with notice that a good title cannot be made.

Here we may notice a case in which a purchaser may be obliged to take lands subject to some defect of title or particular incumbrance, without any written stipulation to that effect. Where the vendor's obligation to show a good title is not an express term of the contract, but is merely implied, as in the case of an open contract (*w*), it is open to him to prove that the purchaser bought with notice (though given by word of mouth only) that a good title could not be made, either wholly or partially; and the vendor will then be exonerated from showing title to the extent indicated by such notice (*x*). But where the vendor has expressly con-

(*u*) Above, pp. 61, n. (*w*), 141, 158.
(*v*) Above, pp. 156 *sq.*
(*w*) Above, p. 27.
(*x*) *Ogilvie* v. *Foljambe*, 3 Mer. 53, 64; *Re Gloag and Miller's Contract*, 23 Ch. D. 320, 327;

tracted to show a good title, he is not permitted to modify the terms of his written agreement by giving oral evidence of any such notice (*y*).

Difference in purchaser's position when resisting specific performance, and when seeking to recover deposit.

Best v. *Hamand*.

We will now consider the authorities establishing the difference, to which we have before referred (*z*) in the position of a purchaser under a special contract as to title when he is resisting specific performance in equity and when he is seeking to recover his deposit at law. In *Best* v. *Hamand* (*a*), a railway company sold land as superfluous land under conditions that the purchasers should assume (without proof) that everything had been done by the company to enable them to sell the land as surplus land, and that the deposit should be forfeited if the purchasers failed to comply with the terms of the agreement. The purchaser discovered from other sources that some of the adjoining owners had not waived their right of pre-emption; and insisted on this objection to the title (*b*). The vendors thereupon claimed the deposit as forfeited; and it was held by the Court of Appeal, reversing the decision of Hall, V.-C., that the purchasers were not entitled to recover it, as they had in effect contracted to take the vendor's title without objection on this point, and had not therefore abided by the terms of the contract. But if in this case the vendors had sued for specific performance, it appears that the purchasers might have resisted their claim, except on condition of the vendors showing that they could give at least a good holding title; for the

Ellis v. *Rogers*, 29 Ch. D. 661, 666, 671, 672; Fry, Sp. Perf. § 377, p. 172, 3rd ed.; pp. 161, 162, 4th ed. It is submitted that the case of *Re Highett and Bird's Contract*, 1903, 1 Ch. 287, was, in so far as it conflicts with this rule, wrongly decided; see below, Chap. X. Sect. 2 (Sale of Leaseholds).

(*y*) *Cato* v. *Thompson*, 9 Q. B. D. 616. Aldendale Sale & L. v. McGrory 117 L.T.R. 391 (1917)

(*z*) Above, pp. 32, 69, 70.

(*a*) 12 Ch. D. 1.

(*b*) Under sect. 128 of the Lands Clauses Act, 1845 (Stat. 8 & 9 Vict. c. 18), before superfluous land can be sold by a railway company, it must be offered to the owner of the lands from which it was originally severed, and in default of this, to the owners of the adjoining lands.

vendors, having required the purchasers to assume the truth of a statement which the vendors knew to be false, had made a misrepresentation sufficient to preclude them from enforcing specific performance according to the letter of the contract (*c*). So in *Nottingham Patent Brick and Tile Co.* v. *Butler* (*d*), we have seen that land was bought subject to the condition that it was sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not, and it was held that, the land being subject to restrictive covenants known to the vendor but not disclosed at the time of sale, the vendor could not enforce specific performance: but it was intimated that the purchaser would not have been able to recover his deposit, if he had not bought on the faith of the vendor's solicitor's representation that the land was free from such covenants. Again, in *Re Davis to Carey* (*e*) property was sold as "leasehold business premises" under conditions that the title should commence with the conveyance to the vendors, and that no objection should be made in respect of anything contained in the lease. No information as to the contents of the lease was given and no opportunity of inspecting it. The purchaser discovered after the sale that the lease contained covenants prohibiting the tenant from carrying on any trade or business on the premises. Stirling, J., in a vendor and purchaser summons taken out by the purchaser, held that, regard being had to the sale of the property as business premises, the purchaser was entitled to have an assignment of property where he could carry on any business (*f*), and so the vendor had not shown such a title as the purchaser was compelled to accept. But he declined to order the return of the deposit, pointing out that *Best* v.

Re Davis to Carey.

(*c*) *Re Banister, Broad* v. *Munton*, 12 Ch. D. 131; above, p. 160.
(*d*) 16 Q. B. D. 778; above, p. 157.
(*e*) 40 Ch. D. 601.
(*f*) See above, p. 36.

Hamand (*g*) showed that the right to recover a deposit at law was not governed by the same considerations as the right to resist specific performance in equity. He therefore left the purchaser to bring an action at law, if so advised, for the return of his deposit. In *Re National Provincial Bank of England and Marsh* (*h*), land was sold under the condition that the title should commence with a conveyance dated in 1869, and the prior title should not be required, investigated or objected to. The purchaser discovered from other sources that the grantor in the conveyance of 1869 derived title under a will; which, the purchaser was advised, conferred a life estate only. The purchaser insisted on this objection, and took out a vendor and purchaser summons for the return of his deposit. North, J., admitted that the vendors might have a difficulty in enforcing specific performance, but held that the purchaser had no right to the return of his deposit, as the stipulation plainly barred independent investigation of and all objection to the earlier title (*i*), and the purchaser had not therefore observed the terms of the contract. Finally, in *Re Scott and Alvarez's Contract* (*j*), land held by underlease was sold under a condition that the purchaser should make no objection or requisition in respect of the intermediate title between the underlease and an assignment thereof in 1891, but should assume that such assignment vested in the assignees a good title for the residue of the term. The purchaser's solicitor nevertheless asked questions as to this intermediate title of the vendor's solicitor, who gave him certain information tending to cast suspicion on such title. The vendor's solicitor asserted that this was done without prejudice to the special condition. The purchaser maintained that, as the vendor had given information as to the intermediate title, he could not oblige the purchaser to

Re National Provincial Bank of England and Marsh.

Re Scott and Alvarez's Contract.

(*g*) Above, p. 165.
(*h*) 1895, 1 Ch. 190.
(*i*) Above, p. 163.
(*j*) 1895, 1 Ch. 596; 2 Ch. 603.

accept the title shown without clearing up the suspicions raised (*k*). The purchaser took out a vendor and purchaser summons in support of this contention, which prevailed with Kekewich, J., but was disallowed in the Court of Appeal. The Lords Justices held that, to enable the purchaser to escape from the stringent condition into which he had entered, it was not enough to show that the title was suspicious, but he must prove it to be bad; and as it was made to appear to them that the purchaser's main objection was removed by the Statute of Limitations, they held that he had failed in such proof. After this, the purchaser discovered that gross frauds had been committed with respect to the intermediate title, and that several documents, on which the vendor's title depended, were forgeries; and he declined to complete the purchase. The vendor, who was not in any way implicated in the frauds, then brought an action for specific performance, to which the purchaser by leave counterclaimed to review the order of the Court of Appeal made in the summons, on the ground of the subsequent discovery of fresh material facts. Kekewich, J., not only dismissed the vendor's action for specific performance but ordered him to return the deposit. But, on the case being again taken to the Court of Appeal, it was considered that at law the purchaser was strictly bound by the contract into which he had chosen to enter, and could not therefore recover his deposit, as there had been no breach of contract by the vendor. But it was declared that the specific performance of the contract in equity depended on different considerations; and on this point the judgment was affirmed for the reason that, as the vendor had no holding title at all, but was liable to instant ejectment, his title was not such as the Court would oblige an unwilling purchaser to take.

(*k*) See above, p. 160.

Recovery of deposit under agreement that title shall commence with some specified instrument, which turns out not to be a good root of title.

The above decisions raise a question as to the purchaser's right to recover his deposit, where he has entered into a contract that the title shall commence with a particular instrument less than forty years old (*l*), and it turns out that this is not a good root of title. What is the effect at law of an agreement that the title shall commence with an instrument, of which the nature is not specified? Take the case of a sale of freeholds in fee subject to a condition that the title shall commence with a particular deed dated twenty years before the contract, and without any stipulation precluding investigation of the earlier title other than is contained in the Conveyancing Act of 1881 (*m*). Have the parties agreed that that deed, whatever it may be, shall be the root of title, or have they merely stipulated that proof of title as from the date of that deed shall be accepted, instead of proof of forty years' title, as proof of a good title? (*n*) It is submitted that the latter is the true meaning of the condition, and that it does not exonerate the vendor from the obligation of proving title to the whole estate contracted to be sold at the beginning as well as at the end of the period for which title is to be shown (*o*). Thus if the deed mentioned in the condition should turn out to be merely a lease for years, or the conveyance of an equity of redemption, the purchaser would be entitled to call for further evidence of title (*p*). And it is submitted that in requiring such evidence he would not commit any breach either of the express condition or of the stipulation incorporated in the contract by the Conveyancing Act. For he would not be asking for production of evidence of the title *prior* to the time stipulated for commencement of title; which the statutory stipulation precludes him from demanding (*q*).

(*l*) Above, p. 51.
(*m*) Stat. 44 & 45 Vict. c. 41, s. 3 (3); above, p. 154.
(*n*) See above, pp. 75—77.
(*o*) See above, pp. 87, 88.
(*p*) Above, pp. 159, 160.
(*q*) Above, p. 154.

What he would really be requiring is proof of the title *at the date* of the specified deed to such part of the estate contracted to be sold as was not dealt with by that deed. It is submitted that a more stringent stipulation than the supposed condition would be necessary to exonerate the vendor from the obligation of producing such proof; and further that the vendor cannot be discharged from this obligation merely because the only available evidence happened to be the production of the earlier title (*r*). If this view be correct, the vendor would not be entitled to retain the deposit if he refused to furnish the evidence required. A distinction however must be drawn between the instance given above and a case where the nature of the instrument, with which the title is to commence, is plainly described. Thus if it were agreed that the title should commence with an Indenture of such a date, "being a settlement on marriage of the property sold, subject to certain mortgages therein recited," there would be good ground to contend that the purchaser agreed to accept that deed as the root of title. Again, a difference is to be observed in cases like *Re Marsh and Earl Granville* (*s*), where it is agreed that the title shall commence with a specified deed, and that deed does show title to the whole estate contracted for, but is objected to for some other reason, as because it is a voluntary conveyance. In that case the purchaser did not abide by the contract in requiring evidence of the earlier title; and it does not appear that he could have recovered his deposit. The proceedings were throughout treated as a vendor's action for specific performance. And the doctrine there laid down, that a purchaser agreeing that the title shall commence with a deed less than forty years old is entitled to assume that the deed is a conveyance for valuable consideration (*t*), is applicable only in

(*r*) See *Phillips* v. *Caldcleugh*, above, p. 156.

(*s*) 24 Ch. D. 11; above, p. 158.

(*t*) See above, pp. 89, 159.

proceedings for specific performance and not in an action on the contract at law. As previously recommended (*u*), purchasers buying by private contract should avoid raising any question as to the retainer of the deposit by requiring the vendor to guarantee the instrument, with which the contract is to commence, to be a good root of title.

Purchaser under usual condition as to identity requiring further evidence.

Again, it may be asked whether a purchaser will be entitled to recover his deposit, if, having bought under the usual condition as to evidence of identity (*v*), he require further evidence of identity on the ground that the descriptions in the title deeds fail, either wholly or partially, to prove the identity of the property bought with that to which the deeds relate. It appears however that the usual condition (*v*) as to evidence of identity does not altogether discharge the vendor from the obligation of proving identity: it merely saves him from the necessity of giving evidence of identity independent of the title-deeds. And if the deeds themselves fail to show identity, it does not appear that the vendor performs his contract at law (*w*). If so, he cannot claim to retain the deposit.

Course to adopt in making requisitions.

The proper course for the purchaser's counsel to adopt in matters of this kind appears to be to require the vendor, in the first instance, to show such a title and furnish all such evidence as he would be obliged to show or produce in an action for specific performance at his own suit. And the purchaser's advisers should endeavour to secure compliance with such requisitions by their diplomatic conduct of the negotiations. If this fails to attain its object, the purchaser should be careful to insist only on such requisitions as the vendor is obliged to comply with at law. And he should with-

(*u*) Above, p. 71.
(*v*) Above, pp. 54, 60.
(*w*) See the authorities cited in note (*r*) to p. 55, above.

draw all requisitions for any evidence of title, which the vendor would have to produce to obtain specific performance at his own suit, but need not show in order to discharge his contract at law. As we have seen (*x*), unless the vendor seek actively to enforce the specific performance of the contract, the purchaser has no means of obliging him to furnish such evidence.

Conditions requiring assumptions of fact.

We have seen (*y*) that a condition of sale, requiring the purchaser to assume without proof the truth of some fact or facts stated, is not binding, as regards the specific performance of the contract, if the vendor know the statement made to be untrue. But if the vendor believe the statement made to be true and have no reason to suppose that it is incorrect, the condition is fully binding on the purchaser, although it do not appear from the contract what defect of title the assumption required is intended to cover (*z*).

Position of purchaser buying under special conditions as against persons claiming adversely to the vendor.

If a purchaser buy under conditions limiting his right to inquire into the vendor's title, he will of course have no protection against any *legal* estates or rights, adverse to the vendor's interest, which might have been discovered by a complete investigation of the title. But this liability arises from the fact that *legal* estates or interests in land are rights directly enforceable against the land into whosesoever hands it may come (*a*); and it is no defence against persons seeking to enforce such rights that the purchaser made the fullest investigation of the vendor's title. With regard to *equitable* estates or interests adverse to the vendor's title, the case is different; and if the purchaser obtain the legal estate from the vendor without notice of such estates or interests he will not be bound thereby (*a*). But a

(*x*) Above, p. 69.
(*y*) Above, pp. 160, 161.
(*z*) *Re Sandbach and Edmondson's Contract*, 1891, 1 Ch. 99.

(*a*) See Wms. Real Prop. 2, 3, 64, 178, 553, 19th ed.; below, Chap. XI. Sect. 2 (Assignment by Party to the Contract).

Purchaser not investigating title has constructive notice of equities which he might have discovered by inquiry.

purchaser, who buys under conditions limiting his right to investigate the title, has constructive notice of all equitable incumbrances, which he would have discovered if he had inquired into the vendor's title for the period during which the title is required to be shown by law (*c*). For it is considered that a purchaser is bound to inquire into his vendor's title; and he is not allowed to escape the consequences of such inquiry, as regards notice of equities apparent on the face of the title, by contracting not to investigate the title. The reason of this is obvious. If a purchaser under restrictive conditions were able to plead purchase of the legal estate without notice against a prior equitable incumbrancer, it would always be in the power of any one who held land subject to an equitable incumbrance, to deprive the incumbrancer of his right by a sale under conditions prohibiting inquiry into title; and a purchaser under special conditions is supposed to take all risks and to pay a diminished price in consequence (*d*).

(*c*) *Worthington* v. *Morgan*, 16 Sim. 547; *Peto* v. *Hammond*, 30 Beav. 495; *Wilson* v. *Hart*, L. R. 1 Ch. 463; *Carter* v. *Williams*, L. R. 9 Eq. 678; *Patman* v. *Harland*, 17 Ch. D. 253; *Re Cox and Neve's Contract*, 1891, 2 Ch. 109, 117, 118; see also *Oliver* v. *Hinton*, 1899, 2 Ch. 264; Berwick v. Price, 1905, 2 Ch. 62.

(*d*) See the cases cited in the previous note. Fry, J., appears to have lost sight of these principles in holding in *Kettlewell* v. *Watson*, 21 Ch. D. 685, 708, that persons who purchased very small pieces of land without investigating the title, were not affected with constructive notice of an equitable incumbrance, which the usual investigation of title would have disclosed. There was no appeal from his decision on this point: but his views do not appear to have been accepted by the C. A. See 26 Ch. D. 501, 508.

CHAPTER VII.

OF DEVOLUTION ON DEATH AND THE DEATH DUTIES.

§ 1. Of devolution on death.
§ 2. Of the Death Duties.

§ 1.—*Of devolution on death.*

Devolution on death before 1898.

DEVOLUTION of lands on death is a fact of title which is constantly brought before the conveyancer. As the law on this subject has been lately altered it is deserving of special consideration. We will begin by giving a short summary of the law in force before the 1st of January, 1898, when the Land Transfer Act, 1897 (*a*), took effect.

Dower and curtesy.

The first thing to be remembered in considering who were rightfully entitled to succeed to lands on a former owner's death is the law of dower and curtesy. For the purpose of the investigation of title, it may still be necessary to have regard to the old law of dower, which continued to regulate the dower of all widows who were married before or on the 1st of January, 1834 (*b*). It will be remembered that, at common law, the wife's dower was paramount to every alienation by the husband, whether in his lifetime or by will, of any lands on which the claim had attached: but that in modern times the wife's claim was generally prevented from attaching by the assurance of lands on a purchase to uses to bar dower (*c*).

Dower.

(*a*) Stat. 60 & 61 Vict. c. 65; see sect. 25.

(*b*) Stat. 3 & 4 Will. 4, c. 105, s. 14.

(*c*) See Wms. Real Prop. 314 *sq.*, 380, 19th ed.

The dower of women married after the 1st of January, 1834, is governed by the Dower Act (*d*). This statute deprives the widow of dower out of any land, of which her husband has absolutely disposed in his lifetime or by will (*e*); and postpones her right to dower to all partial estates and interests and all charges created by any disposition or will of the husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable (*f*). It enables the husband to bar his wife's right to dower out of any land by declaration to that effect contained in any deed of his or by will (*g*), or to restrict her right to dower by his will (*h*); and it also deprives the widow of dower out of any land, in which her husband has devised any estate or interest for her benefit, unless a contrary intention be declared by his will (*i*). The general effect of these provisions is that a widow can only claim dower out of lands, which her husband has suffered to descend; and even out of such lands her right to dower may be barred, restricted or postponed (*k*). But it must not be forgotten, in advising on title, that on the death of a tenant of freeholds in fee intestate or on the death of a tenant in tail, his widow may still be entitled to dower.

(*d*) Stat. 3 & 4 Will. 4, c. 105.

(*e*) Sect. 4.

(*f*) Sect. 5. The opinion has been expressed that, notwithstanding the above words, the widow's dower is paramount to the claims of her late husband's creditors, who have not in his lifetime obtained a charge on his lands; Romilly, M.R., *Spyer* v. *Hyatt*, 20 Beav. 621; Wood, V.-C., *Jones* v. *Jones*, 4 K. & J. 361. In neither of these cases, however, was the expression of this opinion necessary to the decision. *Spyer* v. *Hyatt* was a case of freebench; and it had been previously decided that the Dower Act has no application to freebench; *Smith* v. *Adams*, 18 Beav. 499; 5 De G. M. & G. 712; so Lord Romilly's *dictum* was peculiarly gratuitous. *Jones* v. *Jones* was the case of a mortgage by the husband. It is submitted that, according to the ordinary meaning of the words used in the Act, a man's lands are by stat. 3 & 4 Will. 4, c. 104 made "subject or liable" to his debts after his death, notwithstanding that his creditors have no charge thereon.

(*g*) Sects. 6, 7.

(*h*) Sect. 8.

(*i*) Sect. 9.

(*k*) See Wms. Real Prop. 318, 319, 19th ed.

Curtesy.

Curtesy at common law was of course an estate commencing in the wife's lifetime on the birth of issue that might inherit (*l*). But as regards estates of inheritance held on trust for the wife's separate use or held by her as her separate property under the Married Women's Property Act, 1882, the husband has no right to possession or receipt of the rents and profits during his wife's lifetime, and he can only claim an estate by the curtesy, if entitled by the birth of issue, on the wife's death and intestacy; and not in case she has disposed of the estate in her lifetime or by will (*m*).

Succession to freeholds after death before 1898.

Subject to the law of dower and curtesy, on the death before the year 1898 of a tenant of freeholds who was also the beneficial owner, his estate devolved as follows according to its nature:—An estate in fee simple passed directly to the devisee, if it should have been disposed of by will (*n*), or in case of intestacy, to the heir of the last purchaser (*o*). In case of a total failure of the heirs of the last purchaser, the estate descended to the heir of the person last entitled thereto (*p*): but if there were no such heir, it escheated to the lord of the fee, and usually to the Crown, in default of any mesne lord being able to prove his title (*q*). It does not fall within the scope of the present work to set out all the rules for the descent of a fee to the heir of the last purchaser or person last entitled (*r*): but the conveyancer may be reminded of the interest given by the Intestates' Estates

(*l*) See Wms. Real Prop. 300, 19th ed.

(*m*) Ibid. 309, 311; *Cooper* v. *Macdonald*, 7 Ch. D. 288; *Hope* v. *Hope*, 1892, 2 Ch. 336.

(*n*) Wms. Real Prop. 73—75, 237, 238, 253, 19th ed.

(*o*) That is, of course, under the Inheritance Act, 1833, regulating the succession on deaths occurring after the year 1833. On deaths before 1834, lands descended according to the common law rules to the heir of the person last seised; Wms. Real Prop. 84, 221, 222, 19th ed.

(*p*) This was by virtue of stat. 22 & 23 Vict. c. 35, ss. 19, 20, passed 13th August, 1859; Wms. Real Prop. 229, 19th ed.

(*q*) Ibid. 55—58, 235.

(*r*) See for these Wms. Real Prop. 221 *sq.*, 19th ed.

Act, 1890 (*s*), to the widow in the real estate of any man dying intestate after the 1st of September, 1890, and leaving a widow but no issue. Estates tail, if not barred in the tenant's lifetime (*t*), descended to the heir in tail *per formam doni* (*u*). And where lands are subject to the custom of gavelkind or borough-English, it must not be forgotten that the descent of estates tail, as well as estates in fee simple, is regulated by the custom (*x*). Life estates of course cease on death: but estates *pur autre vie* passed, if devised, to the devisee, and otherwise either to the heir as special occupant, or if there were no special occupant to the deceased tenant's executors or administrators; and in the last-mentioned event they became distributable in the same manner as personalty (*y*).

Estates tail.

Gavelkind; borough-English.

Estates *pur autre vie.*

Copyholds held beneficially in customary fee simple or tail may by special custom be subject to the widow's freebench or the husband's curtesy (*z*). Subject to these rights, copyholds held in fee are devisable without any surrender to the use of the tenant's will (*a*): but the devise only gives the devisee a right to be admitted, similar to the right of a surrenderee, and he does not become completely tenant until admittance, a ceremony usually involving the payment of a fine to the lord (*b*). In default of being devised, copyholds in fee descend to the customary heir, that is, to the person entitled by the custom of the manor in which the lands lie, to

Copyholds.

(*s*) Stat. 53 & 54 Vict. c. 29; see *Re Twigg's Estate*, 1892, 1 Ch. 579; *Re Charriere*, 1896, 1 Ch. 912; Wms. Real Prop. 226, 319, 19th ed.

(*t*) See Wms. Real Prop. 105, 19th ed.

(*u*) Ibid. 225.

(*x*) Ibid. 58, 60.

(*y*) That is, of course, under the provisions of the Wills Act, replacing those of stat. 14 Geo. II. c. 20, and the Statute of Frauds; see Wms. Real Prop. 130, 131, 19th ed.; *Re Inman*, 1903, 1 Ch. 241.

(*z*) Wms. Real Prop. 482, 483, 19th ed.

(*a*) That is, since stat. 55 Geo. III. c. 192, passed 12th July, 1815; see Wms. Real Prop. 474, 475, 19th ed.

(*b*) See *Garland* v. *Mead*, L. R. 6 Q. B. 441; Wms. Real Prop. 455, 456, 474, 475, 19th ed.

succeed to them as heir; and he acquires the estate directly on the ancestor's death, though he is not completely tenant as regards the lord until admittance (*c*). And it appears that, even when copyholds are devised by will, the estate descends to the customary heir, pending the devisee's admittance (*d*). Copyholds given to the tenant and the heirs of his body in a manor, where there is no custom to entail, being held for an estate similar to a fee simple conditional at common law, are alienable and therefore devisable on the birth of issue: but if not devised, they descend to the customary heirs of the donee's body only (*e*). Copyholds held to the tenant and the heirs of his body of a manor, where there is a custom to entail, appear not to be devisable by will, if the entail be not duly barred in the tenant's lifetime (*f*); and unless the entail be so barred, they will descend to the customary heir in tail (*g*). Copyholds held for an estate *pur autre vie* are devisable; if not devised, they descend to the heir of the grantee, if the estate were given to him and his heirs: otherwise they pass to the executors or administrators and are distributable as personalty (*h*).

Leaseholds.

Leaseholds for years were always devisable as chattels. As chattels too, they devolved upon the deceased tenant's executors or administrators and were applicable in payment of his debts (*i*). And the executors or administrators, or any one of them (*j*), always had the

(*c*) Wms. Real Prop. 447, 464, 19th ed.

(*d*) *Garland* v. *Mead*, L. R. 6 Q. B. 441; but see Davidson's Concise Precedents, 546, n., 17th ed.

(*e*) 1 Scriv. Cop. 69, 3rd ed.; *Rowden* v. *Maltster*, Cro. Car. 42; Wms. Real Prop. 459, 19th ed.

(*f*) See stat. 3 & 4 Will. IV. c. 74, ss. 40, 50. Before this Act, it was held that in manors where entails were barrable by surrender, they might be barred by a surrender to the use of the tenant's will, *Carr* d. *Dagwell* v. *Singer*, 2 Ves. Sen. 603; *Moore* v. *Moore*, ib. 596, 602; 1 Scriv. Cop. 71, 3rd. ed.

(*g*) See Wms. Real Prop. 459—461, 19th ed.

(*h*) Ibid. 461.

(*i*) Ibid. 20, 21, 505.

(*j*) *Simpson* v. *Gutteridge*, Madd. 609.

same powers of disposition over the deceased person's leaseholds as over his other chattels (*k*); and so might sell or mortgage the same to raise money for payment of funeral or testamentary expenses or debts, or, if necessary, legacies. By such a sale or mortgage the leaseholds are conveyed free from all claims of the deceased person's creditors, legatees or next of kin; and the purchaser or mortgagee is in no way concerned to see to the application of the purchase money, or to inquire for what purpose the sale or mortgage is made (*l*). Leaseholds, if specifically bequeathed, devolve nevertheless upon the executor in the first instance and do not pass to the specific legatee until the executor has assented to the bequest: but when this assent is given, they vest in the legatee at once, without the necessity of any formal conveyance to him (*m*). Leaseholds are also distributable as other chattels upon intestacy according to the Statutes of Distribution (*n*). There is, however, this difference between leaseholds and other goods:—Personal chattels devolve on death according to the law of the country in which their owner was domiciled, whilst the succession to lands held under a lease for years is determined by the law of the place where they are situate (*o*).

Equitable estates.

The devolution on death of an equitable estate in land corresponded in general with that of the legal estate, which was the subject of the equity. Thus the succession after death to the estate of a *cestui que trust*

(*k*) *Brazier* v. *Hudson*, 8 Sim. 67.

(*l*) 2 Wms. Exors., 932—943, 946 *sq.*, 7th ed.; *Re Whistler*, 35 Ch. D. 561; *Re Venn and Furze's Contract*, 1894, 2 Ch. 101.

(*m*) Wms. Exors., 679, 1372, 7th ed.; Wms. Pers. Prop. 423, 15th ed.; *Re Culverhouse*, 1896, 2 Ch. 251.

(*n*) Wms. Real Prop. 21, 19th ed.; Wms. Pers. Prop. 458 *sq.*, 15th ed.

(*o*) Wms. Pers. Prop. 419, 420, 458, 15th ed.; *Freke* v. *Lord Carbery*, L. R. 16 Eq. 461; *Duncan* v. *Lawson*, 41 Ch. D. 394; *Pepin* v. *Bruyère*, 1902, 1 Ch. 24.

under a simple trust or of a mortgagor of freeholds, copyholds or leaseholds, was governed by the same rules as determined the course of the legal interest therein (*p*). The exception was that under the old law a widow could claim no dower out of her husband's equitable estate (*q*). This exception was removed by the Dower Act in the case of wives married after the 1st of January, 1834 (*r*) : but such dower was placed under the control of the husband equally with dower out of legal estates (*s*).

Estates held on trust or in mortgage.

Formerly, when lands were held upon any trust or by way of mortgage, the legal estate therein devolved upon the tenant's death in the same manner as if he were the beneficial owner of them, but subject to the trust or the equity of redemption. Estates in fee simple so held passed therefore to the devisee or heir, according as they were devised or suffered to descend (*t*). In all well-drawn wills a specific devise used to be inserted of all estates held by the testator upon any trust or by way of mortgage; and this devise was usually made to the persons who were appointed executors (*u*). When a will contained no specific devise of estates subject to a trust or mortgage, the question frequently arose, whether such estates passed under a general devise of all the testator's real estate. The rule was, that such estates did pass under a general devise, unless a contrary intention could be collected from the expressions used in the will, or from the objects of the devise (*x*).

The old rule as to the devolution of estates held on

(*p*) Lewin on Trusts, 670, 6th ed.; 1006, 10th ed.; Wms. Real Prop. 181, 187, 477, 535, 19th ed.

(*q*) Ibid. 315.

(*r*) Stat. 3 & 4 Will. IV. c. 105, s. 2; Wms. Real Prop. 319, 19th ed.

(*s*) Above, p. 176.

(*t*) Wms. Real Prop. 188, 531, 534, 19th ed.

(*u*) 4 Davidson, Prec. Conv. 9, 58, 4th ed.

(*x*) *Lord Braybroke* v. *Inskip*, 8 Ves. 417; 1 Jarm. Wills, 693 *sq.*, 4th ed.; 647 *sq.*, 5th ed.

trust was first invaded by the Vendor and Purchaser Act, 1874 (*y*), enacting that upon the death of a bare trustee (*z*), any corporeal or incorporeal hereditament, of which he was seised in fee simple, should vest in his legal personal representative. This enactment was repealed, except as to anything duly done thereunder, by the Land Transfer Act, 1875 (*a*), after having been in force from the 7th of August, 1874, until the 31st of December, 1875. The same Act provided (*a*) that, upon the death of a bare trustee *intestate*, any corporeal or incorporeal hereditament, of which he was seised in fee simple, should vest in his legal personal representative.

Mortgaged estates.

When real estate held in mortgage passed on the mortgagee's death to his devisee or heir, it was necessary, on any transfer or reconveyance after such death, that his devisee or heir should convey the legal estate in the mortgaged land, and that his legal personal representatives should join in the conveyance to acknowledge the receipt of the money paid and assign or release the mortgage debt (*b*). By the Vendor and Purchaser Act, 1874 (*c*), the legal personal representative of a mortgagee of a freehold estate, or of a

(*y*) Stat. 37 & 38 Vict. c. 78, s. 5.

(*z*) Different opinions have been expressed by eminent judges as to the meaning of the expression "bare trustee": but the better opinion is that it is not applicable to a trustee under a special trust who has an active duty to perform with regard to the trust property, as in the case of a trustee for sale, but rather denotes a trustee having no other duty than to convey the trust estate at the *cestui que trust's* direction; see *Christie* v. *Ovington*, 1 Ch. D. 279; *Morgan* v. *Swansea Urban Authority*, 9 Ch. D. 582; *Re Doewra*, 29 Ch. D. 693; *Re Cunningham and Frayling*, 1891, 2 Ch. 567; Wms. Real Prop. 178, 19th ed.

(*a*) Stat. 38 & 39 Vict. c. 87, s. 48, repealed by 44 & 45 Vict. c. 41, s. 30 (2, 3), as to cases of death after the 31st December, 1881.

(*b*) Davidson, Prec. Conv., vol. ii. pt. ii. pp. 793, 796, n., 816, 818, 4th ed.

(*c*) Stat. 37 & 38 Vict. c. 78, s. 4, passed 7th August, 1874, and repealed by 44 & 45 Vict. c. 41, s. 30 (2, 3), as to cases of death after the 31st December, 1881.

copyhold estate to which the mortgagee should have been admitted, might, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage were in form an assurance subject to redemption, or an assurance upon trust. But it was held that this enactment did not give the legal personal representative of a mortgagee power to convey the estate upon a transfer of the mortgage (*d*).

Devolution of real estate held in trust or mortgage after 1881.

So the law continued until the end of the year 1881. On the death after that year of any sole trustee or mortgagee of real estate, the succession is regulated by the 30th section of the Conveyancing Act of 1881 (*e*), providing as follows :—" Where an estate or interest of inheritance or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust or by way of mortgage in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his legal personal representatives or representative from time to time (*f*), in like manner as if the same were a chattel real vesting in them or him ; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities and obligations, as if the same were a chattel real vesting in them or him ; and for the purposes of this section, the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns within the meaning of all trusts

(*d*) *Re Spradbery's Mortgage*, 14 Ch. D. 514.

(*e*) Stat. 44 & 45 Vict. c. 41, s. 30.

(*f*) These appear to be his general, and not his special, executors ; *Re Parker's Trusts*, 1894, 1 Ch. 707 ; cf. below, p. 193.

and powers." This enactment was held to apply to copyholds as well as freeholds (*g*): but the Copyhold Act, 1887 (*h*), now replaced in this respect by the Copyhold Act, 1894 (*i*), provided that it should not apply to land of copyhold or customary tenure vested in the tenant on the Court Rolls of any manor upon any trust or by way of mortgage. As is well known, trustees of copyhold lands are usually admitted tenants thereof, but mortgagees are not (*j*). On the death of a mortgagee of copyholds, who has not been admitted tenant on the rolls, it appears that his estate will still devolve on his executors or administrators.

Copyholds.

Before 1898, freeholds in fee were liable to be applied in payment of the tenant's debts after his death either because, in the case of specialty debts, he had bound his heir to their payment, or because he had by will devised his real estate in trust for or charged with payment of his debts, or under Statute 3 & 4 Will. IV. c. 104 making real estate equitable assets for the payment of the deceased owner's debts generally (*k*). Copyholds in fee were liable to their deceased owner's debts either by virtue of an express charge of debts thereon or under the same statute (*l*). Estates tail in freehold or copyhold were not liable to the tenant's debts after his death (excepting certain Crown debts), unless during his lifetime a judgment had affected the lands, or he had been adjudged bankrupt (*m*). Life estates are of course not liable to the tenant's debts after they have determined by his death or otherwise (*n*). Estates *pur autre vie* were subject to the deceased tenant's debts, if devised,

Liability of real estate to deceased owner's debts.

(*g*) *Re Hughes*, W. N. 1884, p. 53; *Hall* v. *Bromley*, 35 Ch. D. 642.

(*h*) Stat. 50 & 51 Vict. c. 73, s. 46, passed 16th September, 1887; see *Re Mills' Trusts*, 37 Ch. D. 312; 40 Ch. D. 14.

(*i*) Stat. 57 & 58 Vict. c. 46, s. 88.

(*j*) Wms. Real Prop. 547, 19th ed.

(*k*) Ibid. 273—276.

(*l*) Ibid. 462.

(*m*) Ibid. 281—283, 463.

(*n*) Ibid. 283, 463.

either by virtue of an express charge or under the last-mentioned statute; and if not devised, under the Wills Act, replacing with regard to freeholds the Statute of Frauds in this respect (*o*). And equitable estates were subject to the like liability as estates at law (*p*). When the heir was specially bound to pay his ancestor's debt, the creditor had the remedy of suing the debtor's heir or devisee personally in an action of debt or covenant: but in order to have the debtor's lands applied in payment of debts after his death the creditor was obliged to take proceedings in equity for the administration of the debtor's estate, when a sale or mortgage of the lands would be decreed, if necessary, to raise money to pay the debt (*q*). And the same proceedings were necessary to secure the benefit of an express charge of debts on real estate or of the statute of 3 & 4 Will. IV. c. 104 (*r*). Where the heir was specially bound or the lands were made assets by the statute, the debts were not a specific lien on the lands; so that if the lands were aliened for valuable consideration by the heir or devisee before any creditors' proceedings were instituted, the creditor could not follow the lands in the hands of the alienee (*s*), who was not bound, even if he had notice of the deceased owner's debts, to see to the application of the purchase money (*t*). And where lands were devised on trust for or charged with payment of debts, the devisee was also enabled to dispose of them, before the institution of any creditors' proceedings, discharged from all liability to the testator's debts; as it was considered that the testator, both in the case of a trust to pay debts and of a charge of debts, had made

(*o*) Stat. 7 Will. IV. & 1 Vict. c. 27, ss. 3, 6; Wms. Real Prop. 130, 131, 461, 462, 19th ed.

(*p*) Ibid. 286.

(*q*) Wms. Real Prop. 277, 19th ed.; Wms. Real Assets, 16.

(*r*) Wms. Real Prop. 277, 19th ed.

(*s*) *Spackman* v. *Timbrell*, 8 Sim. 253; *Richardson* v. *Horton*, 7 Beav. 112; *Kinderley* v. *Jervis*, 22 Beav. 1, 22; Sug. V. & P. 655–657; *Price* v. *Price*, 35 Ch. D. 297.

(*t*) *Jones* v. *Noyes*, 4 Jur. N. S. 1033.

his devisee a trustee for the payment of his debts, and from the nature of such a trust a purchaser from the devisee was exonerated from the duty of seeing to the application of the purchase money (*u*). And a mortgagee from a devisee or heir, before creditors' proceedings, was in the same position as a purchaser (*x*). But after an order had been made for the general administration of the deceased debtor's estate, in creditor's proceedings duly registered as *lis pendens* (*y*), the heir or devisee could not dispose of the lands descended or devised to him free from the creditors' claim (*z*). Whether he could so dispose of such lands after creditors' proceedings had been instituted and duly registered as a *lis pendens*, but before an order for administration had been made therein, depended on the nature of the proceedings. If they sufficiently indicated an intention to enforce payment of the debts out of the lands descended or devised, and the heir or devisee were made a party thereto, a purchaser or mortgagee from him would be bound thereby; unless the circumstances were such that the purchaser or mortgagee was entitled to suppose that the sale or mortgage was made to raise money to pay the debts, as where the lands were devised charged with debts to one who was also appointed executor (*a*). The case of a trust or power to sell for payment of debts would appear to be similar; although after an order for administration, the trustees must exercise their powers under the direction of the Court (*b*). So an executor, in exercise of his general power to alien his testator's assets, may well dispose of the testator's leaseholds, notwithstanding that creditors'

(*u*) Sug. V. & P. 658, 660; Wms. Real Assets, 50, 51, 62.

(*x*) *Ball* v. *Harris*, 4 My. & Cr. 264; *Eland* v. *Eland*, ib. 420; *British Mutual Investment Co.* v. *Smart*, L. R. 10 Ch. 567; *Price* v. *Price*, 35 Ch. D. 297.

(*y*) See Wms. Real Prop. 286, 19th ed.

(*z*) See *Price* v. *Price*, 35 Ch. D. 297.

(*a*) Ibid.; and see *Corser* v. *Cartwright*, L. R. 7 H. L. 731.

(*b*) Lewin on Trusts, 391, 392, 515, 6th ed.; 515, 733, 734, 10th ed.

proceedings are pending, at any time before an order for administration is made (*c*).

Executors formerly had no interest in their testator's real estate.

Before 1898, the rule was that an executor took no estate or interest by virtue of his office in any of his testator's real estate; any devise of such real estate was entirely independent of the executor's assent or interference (*d*); and, as we have seen (*e*), a will of real estate, as such, did not require probate. We have noticed (*f*) the exceptions created by statute in the case of estates *pur autre vie* undevised, where there was no special occupant, and of estates held on trust or by way of mortgage. But of course a man might expressly devise his lands to his executors on trust for sale or otherwise, or so that his executors should have a power of disposing of his lands; and such devises were commonly made whenever a testator desired that any of his real estate should be sold or applied in payment of his debts. And in certain cases a power for a man's executors to sell his real estate would be implied. Thus if by will lands were directed to be sold, without saying by what persons the sale was to be made, it would be implied that the executors should have the power of selling the lands, if the proceeds of sale would be distributable by the executors, as where the sale was directed to be made for the purpose of paying debts or legacies or the testator had created a mixed fund composed of the proceeds of sale of such lands and of personalty (*g*). And about the middle of the last century it was decided in equity (*h*) that a mere testamentary charge of debts on real estate implied a power

Power for executors to sell real estate might be implied.

(*c*) *Neeves* v. *Burrage*, 14 Q. B. 504.

(*d*) See 1 Wms. Exors., pt. ii. bk. ii.; Wms. Real Prop. 253, 19th ed.

(*e*) Above, p. 128.

(*f*) Above, pp. 177, 178, 182.

(*g*) Sug. Pow. 118, 8th ed.; 1 Wms. Exors. 655, 7th ed.; Wms. Real Assets, 53—55, 77 *sq*.

(*h*) The contrary was decided at law; *Doe* d. *Jones* v. *Hughes*, 6 Ex. 223.

for the executors to sell the real estate so charged (*i*). This doctrine met with severe criticism from eminent lawyers (*j*); it was not only thought to be unwarranted by reason or authority, but it threw doubt on the previously received opinion that a devisee of lands charged with debts could so dispose of the same as to exonerate the purchaser from seeing that the testator's debts were paid (*k*). In 1859, statutory provision was made to remove the difficulties then attendant on the sale of lands charged by will with the payment of debts. Lord St. Leonards' Act (*l*) provides (*m*) that where, by any will that shall come into operation after the passing of the Act, the testator shall have charged his real estate or any specific portion thereof with the payment of his debts or of any legacy, or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy or sum of money out of such estate, such trustee or trustees may, notwithstanding any trusts actually declared by the testator, raise such debts, legacy or money by sale or mortgage of the lands devised to them. But if any testator, who shall have created such a charge, shall not have devised the hereditaments charged in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in his will (if any) shall have the same power of raising the same moneys

Statutory powers.

(*i*) *Wrigley* v. *Sykes*, 21 Beav. 337; *Sabin* v. *Heape*, 27 Beav. 553.

(*j*) Sug. Pow. 120—122; Sug. V. & P. 662, n.; Wms. Real Assets, 81 *sq.*; Lewin on Trusts, 402 *sq.*, 6th ed.; 526 *sq.*, 10th ed.

(*k*) Above, p. 184.

(*l*) Stat. 22 & 23 Vict. c. 35, passed 13th August, 1859.

(*m*) Sect. 14. The powers thus conferred extend to all persons in whom the estate devised shall for the time being be vested by survivorship, descent, or devise, and to any persons appointed to succeed to the trusteeship, either under any power in the will, or by the Court; sect. 15.

as is before vested in the trustees (*n*). And purchasers or mortgagees are not to be bound to inquire whether the powers thus conferred shall have been duly exercised by the persons acting in exercise thereof (*o*). But these provisions are not to prejudice or affect any sale or mortgage made or to be made in pursuance of any will coming into operation before the passing of the Act; nor are they to extend to a devise to any person in fee or in tail or for the testator's whole estate and interest charged with debts or legacies; nor are they to affect the power of any such devisee to sell or mortgage as he or they may by law now do (*p*). It will be observed that this last enactment does not expressly settle the question whether a devisee of lands charged with debts could dispose of them freed from the charge, according to the old conveyancing opinion (*q*). And in a subsequent case in the House of Lords, where it was held that a devisee of lands charged with debts, who was also an executor, could certainly dispose of the lands freed from the charge, Lord Cairns observed that different considerations might arise where such a devisee was not executor (*r*). Mr. Joshua Williams, however, appears to have had no hesitation in pronouncing for the old conveyancing opinion (*s*) in this case, namely, that the charge of debts enabled the devisee to give a receipt for the purchase-money exonerating the buyer from seeing to its application (*t*). And Mr. Dart approved of this conclusion on principle: although he advised that a prudent purchaser could scarcely disregard Lord Cairns' dictum, and recommended him, in cases not covered by Lord St. Leonards' Act, either to satisfy

(*n*) Sect. 16. Such power shall from time to time devolve to the person or persons (if any) in whom the executorship shall for the time being be vested.

(*o*) Sect. 17.

(*p*) Sect. 18. See *Re Wilson*, 2 Times L. R. 443; 34 W. R. 512.

(*q*) Above, pp. 184, 185.

(*r*) *Corser* v. *Cartwright*, L. R. 7 H. L. 731, 737.

(*s*) Above, p. 184.

(*t*) Wms. Real Prop. 223, 13th ed.; 254, 19th ed.

himself that the debts were paid, or to procure the executors' authority for payment of the purchase money to the devisee (*u*). It has been held that, when executors sell real estate charged with debts under the power of sale so given by statute, the purchaser is not bound to inquire whether any debts remain unpaid, until twenty years have elapsed after the testator's death (*x*).

Administrators.

An administrator of an intestate person's effects of course had no interest in his real estate; and an administrator *cum testamento annexo* acquired no interest in any real estate devised to the executors of the will, and could not exercise any power which the testator had either expressly or impliedly (*y*) given to his executors with respect to his real estate (*z*). Nor can an administrator *cum testamento annexo* exercise the powers given to executors by Lord St. Leonards' Act to sell or mortgage the testator's real estate to pay debts or legacies (*a*).

The Land Transfer Act, 1897.

By the Land Transfer Act, 1897 (*b*), where real estate is vested in any person without a right in any other person to take by survivorship, it shall, on his death after that year (*c*), notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him. This enactment applies to any real estate over which a person executes by will a general power of

(*u*) 2 Dart, V. & P. 618—621, 5th ed.; 697—700, 6th ed.

(*x*) *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465. This rule is not applicable in the case of an executor selling leaseholds: and the purchaser is entitled, unless he have actual notice that no debts remain unpaid, to presume that such a sale is rightly made although more than twenty years have elapsed since the testator's death; *Re Whistler*, 35 Ch. D. 561; *Re Venn and Furze's Contract*, 1894, 2 Ch. 101; *Re Verrell's Contract*, 1903, 1 Ch. 65.

(*y*) Above, pp. 186, 187.

(*z*) Y. B. 15 Hen. VII. fos. 11, 12, pl. 22, translated Sug. Pow. 893, 895, 8th ed.

(*a*) *Re Clay and Tetley*, 16 Ch. D. 3; above, p. 187.

(*b*) Stat. 60 & 61 Vict. c. 65, s. 1 (1).

(*c*) Sects. 1 (5), 25.

appointment, as if it were real estate vested in him (*d*). But the expression "real estate" does not here include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant (*e*). Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate (*f*).

Personal representative trustee for the heir.

Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate (*g*). All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration, and other matters in relation to the administration of personal estate and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him (*h*), save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate (*i*). In the administration of the assets of a person dying after the year 1897, his real

Powers of personal representatives over real estate.

Liability of real estate to deceased owner's debts.

(*d*) Sect. 1 (2).

(*e*) Sect. 1 (4).

(*f*) Sect. 1 (3). Where a person dies possessed of real estate, the Court shall in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir at law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin; sect. 2 (4).

(*g*) Sect. 2 (1).

(*h*) *Sic.*

(*i*) Sect. 2 (2).

estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing in the Act contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies (*k*).

Personal representatives' assent to devise of real estate.

At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance (*l*). And at any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or in the case of registered land, that the person so entitled be registered as proprietor of the land either solely or jointly with the personal representatives (*m*).

Effect of the Act.

It is not the writer's purpose to make an exhaustive comment on this Act: but its most important results

(*k*) Sect. 2 (3). (*l*) Sect. 3 (1). (*m*) Sect. 3 (2).

may be indicated. The first of these is to assimilate the devolution of the legal estate in freehold lands held in fee to that of a chattel real (*n*), and to subject such lands to the same liability to their deceased owner's debts as his chattels incurred at common law, though without interfering with the order in which the assets are applicable in payment of debts (*o*). Then the per-

(*n*) There is this distinction, however:—Pending the appointment of an administrator, the chattels of a person dying intestate vested formerly in the ordinary, and afterwards in the judge of the Court of Probate and now appear to vest in the judges of the High Court of Justice who have succeeded to the jurisdiction of the judges of the Probate Court; Stats 21 & 22 Vict. c. 95, s. 19; 36 & 37 Vict. c. 66, ss. 11, 12, 16, 31, 34; *Pinney* v. *Hunt*, 6 Ch. D. 98; Wms. Pers. Prop. 451—454, 15th ed.: but the freehold estates in fee simple of a person dying intestate appear still to vest in the heir pending the appointment of an administrator. In *John* v. *John*, 1898, 2 Ch. 573, 576, North, J., held that since the commencement of the Land Transfer Act, 1897, real estate *devised to a man's executors* descends to the heir pending probate of the will. But this appears to have been an oversight. Where executors are appointed, they derive their authority and right to represent the testator from the will, not from the Court in which the will is proved. And the Act provides that real estate shall vest in the legal personal representatives in the same manner as chattels real vest in them, and applies to real estate the law with respect to dealing with chattels real before probate. Chattels real vest in the executors appointed by their owner's will immediately on his death; and the executors can dispose of them before probate; *Graysbrook* v. *Fox*, Plowd. 275, 281; *Hensloe's Case*, 9 Rep. 38a; *Woolley* v. *Clark*, 5 B. & A. 744; *Brazier* v. *Hudson*, 8 Sim. 67. And it has since been decided that the law is now the same with regard to real estate; *Re Pawley and London and Provincial Bank*, 1900, 1 Ch. 58. But were this not so, it does not appear that real estate *devised* would descend to the heir pending probate. *

(*o*) See *Re Jones*, 1902, 1 Ch. 92. This is as follows:—

1. The general personal estate not expressly or impliedly exempted.
2. Lands expressly devised to pay debts, whether the inheritance or a term carved out of it, be so limited.
3. Estates which descend to the heir, whether acquired before or after the making of the will.
4. Real or personal property devised or bequeathed, either to the heir or a stranger, charged with debts, and disposed of, subject to such charge; *Re Salt*, 1895, 2 Ch. 203; *Re Roberts*, 1902, 2 Ch. 834.
5. General pecuniary legacies.
6. Specific legacies and real estate devised, whether in terms specific or residuary, *pro ratâ*.
7. Real and personal property over which the testator had a general power of appointment, and which he has appointed, either by his will or by deed, in favour of a volunteer.

See 2 Jarm. Wills, 622, 4th ed.; Wms. Real Prop. 275—277, 19th ed. §

* when an administrator is appt.; his title relates back to the death; Re Pryse, 1904, P 301.

§ There is no right of retainer out of real estate; Re Williams, 1904, 1 Ch 52.

sonal representatives are invested with the same powers of disposition over such lands as they have at common law with respect to chattels real (*p*); but with the important distinction that such powers are not exercise-able by some or one only of several joint personal representatives without the authority of the Court. And it has been decided that, where a testator appoints several executors, his real estate vests in all of them immediately on his death; so that if any one of them do not prove the will and do not renounce probate, the others cannot dispose of the real estate without his concurrence (*q*). Where, however, the testator appoints general executors and also special executors (as of his assets in a colony or foreign country) his real estate in England vests in his general executors only, who can sell and convey the same without the concurrence of the special executors (*r*). The Act makes it equally necessary for executors to assent to a devise of land, whether specific or residuary (*s*), as to a specific bequest of personalty. And it seems that the executors' assent is sufficient to vest in the devisee the legal estate in the devised lands, without any formal conveyance, as in the case of assent to the specific bequest of a chattel

(*p*) See above, pp. 178, 179, 189, n. (*x*).

(*q*) *Re Tawley and London and Provincial Bank*, 1900, 1 Ch. 58. Renunciation of probate by one appointed executor is equivalent to a disclaimer of any interest conferred on him by the appointment in the testator's estate, real or personal; see *Long* v. *Symes*, 3 Hagg. 771, 774, 778; *Re Birchall*, 40 Ch. D 436, 439; *Re Fisher and Haslett*, 13 L. R. Ir. 546. As a rule, a trust estate may be disclaimed by deed or conduct, as well as by matter of record; *Re Birchall*, *ubi sup.* But it should be noted that an executor cannot renounce probate by matter *in pais*; 1 Wms. Exors. 281, 7th ed. Since, therefore, an executor, who has not proved, cannot disclaim the office by deed or conduct, it appears that he cannot so disclaim the estate in the testator's realty vested in him as incident to that office.

(*r*) *Re Cohen's Executors and London County Council*, 1902, 1 Ch. 187.

(*s*) The law regards every devise of lands as being in effect specific, though in terms it may be residuary; *Hensman* v. *Fryer*, L. R. 3 Ch. 420; *Lancefield* v. *Iggulden*, L. R 10 Ch. 136; 2 Jarm. Wills, 1431, n., 5th ed.

real (*t*). But it appears that, where lands are not devised but suffered to descend, the legal personal representatives must convey the same to the heir (*u*). Having regard to the provisions of the Act with regard to the powers of several executors to sell or *transfer* real estate and the right of the heir or devisee to require a *transfer* of the same (*v*), and the above-mentioned decision (*w*), the question is raised whether all those appointed executors (save such as have renounced probate) must not join in assenting to a specific devise (*x*). It seems clear that they must all join in a conveyance of the real estate to the devisee or heir. Where the personal representatives convey the real estate to the heir or devisee, subject to a charge for the payment of any money which they are liable to pay (*y*), and have previously issued the usual statutory advertisements for creditors, the charge does not extend to debts of which they had no notice at the time of conveyance (*z*). The devolution of the beneficial interest in lands is not altered by the Act. Such interest may therefore be devised to the same extent as before, remains subject to the law of dower and curtesy, and upon intestacy descends to the heir or escheats according to the law previously in force (*a*). It is obvious that the term *real estate* (*b*) as used in the Act must receive a restricted interpretation. Life estates are real estate: but as they cease on death, of course they do not pass to the per-

(*t*) Above, p. 179. *

(*u*) See sect. 3 (1), above, p. 191.

(*v*) Above, p. 190.

(*w*) Above, p. 193, n. (*q*).

(*x*) In the case of a chattel, real or personal, assent may be either express or implied, and the assent of one of several executors is sufficient, even though he be himself the legatee; *Townson* v. *Tickell*, 3 B. & A. 31, 40; *Cole* v. *Miles*, 10 Hare, 179; 2 Wms. Exors. 948, 1374—1378, 7th ed. In the absence of any decision, it cannot safely be assumed that this is now the law with regard to realty.

(*y*) See above, p. 191.

(*z*) *Re Cary and Lott's Contract*, 1901, 2 Ch. 463. See Wms. Pers. Prop. 436, 437, 15th ed.

(*a*) Above, pp. 174—177.

(*b*) As to the origin and meaning of the term "real estate," see Wms. Real Prop. 8, 25—29, 181, 531, 19th ed.

* So held, Stamp v. I. R. Commrs, 1905, 1 K.B. 581, deciding that no stp is necy where the assent is given in wtg not under seal.

sonal representatives, nor are they made liable to the deceased owners' debts. It is submitted that the key to the construction of the Act is in the provision that real estate shall vest in the personal representatives, *notwithstanding any testamentary disposition* (*c*). This seems to show that the Act is intended to apply to such real estate as may be effectually devised by will. If this be so, the descent of estates tail, whether legal or equitable, remains unaffected by the Act. But pending the decision of the Court on this point, a real difficulty is raised by the unskilled wording of the Act in the case of estates tail. They are not only real estate, but real estate of inheritance in the hands of the donee; as such, they are subject to the law of dower and curtesy (*d*); and they are charged by statute, in the hands of the heir in tail after his ancestor's death, with debts due from the ancestor to the Crown by judgment, recognizance, obligation or other specialty, although the heir shall not have been comprised therein (*e*), and also with all arrears and debts, if any, due to the Crown from the ancestor as an accountant to the Crown whose yearly or total receipts exceeded three hundred pounds (*f*). Why then, it may be urged, shall not estates tail vest in the deceased owner's personal representatives and be charged with the payment of all his debts, according to the letter of the Land Transfer Act? It is probable, however, that the Court will consider that no sufficient intention is expressed in the Act to subject estates tail to all their deceased owner's debts, and that the Act only applies to devisable real estate. But the point is one on which it would be scarcely safe to act upon a text-writer's opinion. The Act seems to apply to all

Estates tail.

Equitable estates.

(*c*) Sect. 1 (1); above, p. 189.

(*d*) Above, pp. 175, 176.

(*e*) Stat. 33 Hen. VIII. c. 39, s. 52 (s. 75 in Ruffhead); Chitty on the Prerogative of the Crown, 299.

(*f*) Stat. 13 Eliz. c. 4; see 25 Geo. III. c. 35; Chitty, Prerogative, 294, 295.

real estate, to which the deceased person was entitled for his own benefit in equity, and which he might devise by his will. As regards copyholds, difficulties are raised by the wording of the Act; which, it will be observed, is different from that of the statutes governing the devolution of copyhold estates held in trust or mortgage (*b*). It seems clear that legal estates of inheritance in copyholds vested in one, who has been duly admitted tenant on the rolls, for his own benefit, are left to pass to the devisee or heir, according to the previous law (*c*). But the devolution of equitable estates in copyholds is far from plain. Thus where lands are vested in certain tenants on the rolls in trust for another simply in fee, the *cestui que trust* is, as we have seen (*d*), entitled alone to sell the whole estate both legal and equitable in the lands; and in such case an admission by the lord is certainly necessary to perfect the purchaser's title. But no admission or act by the lord is necessary to effect a transfer of the *cestui que trust's* equitable interest (*e*). It would appear that the Act is intended to apply to such devisable estates in copyholds as do not require admission or any act by the lord to perfect the title of a purchaser from the tenant thereof of the tenant's *own interest:* otherwise it is difficult to see that the Act can have any effect in the case of copyholds. But the difficulty, which has been pointed out in the case of a trust estate in copyholds under a simple trust in fee, is even more marked with regard to the interest of an unadmitted surrenderee. Here it can scarcely be denied that admittance is necessary to perfect the title of a purchaser: but on the other hand no fine is payable to the lord by reason of any transfer of such interest (*f*). Perhaps the solution

Copyholds.

(*b*) Above, p. 183.
(*c*) Above, pp. 177, 178.
(*d*) Above, pp. 131, 132.
(*e*) *Hall* v. *Bromley*, 35 Ch. D. 642.
(*f*) Ibid.

of the difficulty may be found in the fact that the Act speaks of perfecting the title of a purchaser from *the customary tenant;* and it may be considered that the tenant on the rolls, who alone is liable to the services and customs (*g*), is the only person, who can be properly described as the customary tenant. But then as the tenant on the rolls may have an estate of inheritance according to the custom at law (*h*), so any person for whom he is trustee enjoys a like estate in equity; and the *cestui que trust*, being in equity the tenant of a customary estate, may be considered to be sufficiently designated as the customary tenant. On the whole, it seems probable that the Act was intended to regulate the devolution of equitable estates in copyholds. And it has been held, since the above remarks were printed, that an equitable estate in fee in copyholds passes to the legal personal representatives under the Act (*i*).

Real estate escheating to the Crown.

It has been held that the Crown is not bound by the Land Transfer Act, 1897, and therefore the legal estate in lands escheating to the Crown does not vest in the solicitor to the Treasury, who takes out administration, as nominee of the Crown, where chattels fall to the Crown upon intestacy (*j*). But it does not appear that this decision governs the case of an escheat to a common person. Lands liable to escheat are devisable (*k*), and are also assets for payment of the deceased tenant's debts (*l*). These are reasons for holding that lands liable to escheat to a mesne lord will vest under the above-mentioned Act in the executors of any will the tenant may have made, though relating to personal estate only, or in his administrator, if he die wholly intestate.

(*g*) See Wms. Real Prop. 478, 19th ed.

(*h*) Ibid. 455 *sq.*, 477.

(*i*) *Re Somerville & Turner's Contract*, 1903, W. N. 153; 72 L. J. Ch. 727. now reported, 1903, 2 Ch. 583

(*j*) *In the Goods of Hartley*, 1899, P. 40.

(*k*) See Wms. Real Prop. 56, 19th ed.

(*l*) *Evans* v. *Brown*, 5 Beav. 114; *Hughes* v. *Wells*, 9 Hare, 749; *Beale* v. *Symonds*, 16 Beav. 406.

Sect. 2. *Of the death duties.*

The death duties.

We now come to the subject of the death duties, by which term the taxes imposed on the succession to property after death are commonly referred to. As we have seen (*m*) it is the duty of the conveyancer advising the purchaser to see that none of these remains charged on the lands sold. A short account of these duties will not therefore be out of place.

Probate duty.

The earliest of the death duties is that commonly called probate duty (*n*); which was a stamp duty imposed on the grant of probate of a will or of letters of administration in respect of the value of the deceased person's personal estate situate within the jurisdiction of the Court granting the probate or administration (*o*). Wills of real estate not formerly requiring to be proved (*p*), probate duty was never payable in respect of any interest in land to which the testator was entitled as real estate, whether at law or in equity (*q*). It was not therefore payable on lands directed by will to be sold, or settled by the testator himself on a revocable trust for sale and payment to himself of the proceeds (*r*). But probate duty was payable in respect of any equitable interest in lands which was absolutely impressed with the character of personalty, as the interest of a vendor of lands (*s*) or of a *cestui que trust* under an absolute trust for sale (*t*), the interest of a partner in real estate forming part of the partnership assets (*u*),

(*m*) Above, p. 140.

(*n*) See Hanson, Death Duties, 1, 10, 4th ed.

(*o*) 1 Wms. Exors., pt. i. bk vii. pp. 617 *sq.*, 7th ed.; Wms. Pers. Prop. 431, 15th ed.

(*p*) Above, p. 128.

(*q*) See 1 Wms. Exors., pt. i. bk. vii. pp. 617 *sq.*, 7th ed.; Hanson, Death Duties, 274, 4th ed.

(*r*) *Matson* v. *Swift*, 8 Beav. 368, 9 Jur. 521.

(*s*) *A.-G.* v. *Brunning*, 8 H. L. C. 243, 6 Jur. N. S. 1083.

(*t*) *A.-G.* v. *Lomas*, L. R. 9 Ex. 29.

(*u*) *A.-G.* v. *Hubbuck*, 13 Q. B. D. 275.

or real estate purchased under an order in Lunacy with the accumulations of the income of a lunatic's personalty and declared in the conveyance to belong to him as personal estate (*x*). Leaseholds for years, being chattels, were of course subject to probate duty (*y*). Purchasers investigating a title to any personalty, which has passed by will or on intestacy, are not concerned to inquire whether the probate duty was duly paid. Their only care need be to obtain production of the probate copy of the will or the letters of administration; neither of which would be issued until the duty was paid (*z*). Probate duty was payable by the executor or administrator (*a*): it was not made a charge on the property according to the value whereof it was levied. But the statute, by which personalty subject to a general power of appointment exercised by will was first made liable to probate duty, provided that the duty so imposed should be a charge on the property in respect of which it was payable (*b*). We may notice that an executor may lawfully dispose of his testator's chattels, whether real or personal, before obtaining probate (*c*); he may be obliged to do so to obtain money to pay the necessary duty. In such case a purchaser from him would take the property sold free from any charge of probate duty: but if it were subsequently necessary to prove the executor's title to make the sale, the probate of the will would be the only evidence available in a court of justice (*d*). Probate duty was abolished by the Finance Act, 1894 (*e*), and estate duty substituted

Leaseholds.

Purchasers need not inquire as to payment of probate duty.

(*x*) *A.-G.* v. *Ailesbury*, 12 App. Cas. 672.

(*y*) 1 Wms. Exors., pt. i. bk. vii. p. 622, n., 7th ed.

(*z*) See stats. 55 Geo. III. c. 184, ss. 38, 45, 47; 44 Vict. c. 12, s. 30.

(*a*) Stat. 55 Geo. III. c. 184, s. 37.

(*b*) Stat. 23 Vict. c. 15, ss. 4, 5.

(*c*) 1 Wms. Exors., pt. i. bk. iv. ch. i. § 2, pp. 302 *sq.*, 7th ed.; above, p 192, n. (*n*).

(*d*) Ibid.; *Pinney* v. *Pinney*, 8 B. & C. 335; *Brazier* v. *Hudson*, 8 Sim. 67; *Pinney* v. *Hunt*, 6 Ch. D. 98.

(*e*) Stat. 57 & 58 Vict. c. 30, ss. 1, 24, and First Schedule.

therefor in the case of persons dying *after* the 1st of August, 1894.

Legacy duty.

Legacy duty is payable on all legacies, whether given specifically or in one sum or by way of annuity or in any other form, which are payable out of the testator's own personal estate, or any personal estate over which he had a power of appointment; on all gifts of the residue or any share of the residue of a testator's personal estate; and on any personal estate or share therein devolving upon intestacy under the Statutes of Distribution (*f*). But appointments by will under a limited power of appointment, to which any sum of money was subjected by marriage settlement for the benefit of any persons specially named as the objects of the power or of the testator's issue, were exempted from legacy duty (*g*). Leaseholds, as chattels, were originally subject to legacy duty: but by the Succession Duty Act, 1853 (*h*), they were made liable to succession duty instead. Gifts made by will of real estate *in specie* were never chargeable with legacy duty. But legacy duty was payable on any legacy (whether given in one sum or by way of annuity or in any other form (*i*)) charged upon the testator's real estate or given out of any moneys to arise by the sale, mortgage or other disposition of his real estate, and also on any bequest of the whole or any share of the clear residue (after deducting debts, funeral expenses, legacies and other charges first made payable thereout, if any) of the moneys to arise from the sale, mortgage or other disposition of any real

Leaseholds.

Legacies charged on real estate, or the proceeds of sale thereof.

(*f*) Stats. 36 Geo. III. c. 52, s. 2; 55 Geo. III. c. 184, Sched., pt. iii., amended by 8 & 9 Vict. c. 76, s. 4; and 51 Vict. c. 8, s. 21 (2); Wms. Pers. Prop. 438, 15th ed. The rates of legacy duty are the same as those of succession duty; see below.

(*g*) Stat. 8 & 9 Vict. c. 76, s. 4. Such appointments, however, give rise to a liability to succession duty; see below.

(*h*) Stat. 16 & 17 Vict. c. 51, s. 19.

(*i*) Stat. 8 & 9 Vict. c. 76, s. 4, replacing 45 Geo. III. c. 28, s. 4; 36 Geo. III. c. 52, s. 7.

estate directed (*k*) by will to be sold, mortgaged or otherwise disposed of (*l*). This duty was not charged by statute on the real estate in question (*m*), but was made payable by the trustees to whom the real estate should be devised, or if there should be no trustees then by the persons entitled to the real estate subject to any such legacy (*n*). The persons for the time being entitled to any real estate charged with any legacy or annuity given by will might therefore be liable to pay the legacy duty thereon (*o*). But purchasers of lands devised on trust for sale or otherwise directed by will to be sold took them free from any charge of legacy duty imposed on any part of the proceeds of sale (*p*). By the Inland Revenue Act, 1888 (*q*), legacy duty shall not be levied and paid in respect of any legacy (*r*) payable or having effect or being satisfied out of or charged or rendered a burden upon the real or heritable estate of any person dying on or after the 1st of July, 1888, or the rents or profits thereof, which such person shall have had any

Legacies charged on real estate now liable to succession duty.

(*k*) If the direction for sale were absolute, legacy duty became payable, notwithstanding that the beneficiary elected to take the property *in specie*, as real estate; *A.-G.* v. *Holford*, 1 Price, 426; *Williamson* v. *Adv.-Gen.*, 10 Cl. & Fin. 1. If the direction for sale were discretionary, and no sale was made, no legacy duty was payable; *A.-G.* v. *Mangles*, 5 M. & W. 120; *Adv.-Gen.* v. *Smith*, 1 Macq. 760. The decisions were conflicting on the question whether duty was payable when the direction for sale was discretionary, and a sale took place in consequence. If in such case the proceeds of sale became liable to be re-invested in the purchase of land, or applied in paying off incumbrances, no duty was payable: but if the proceeds of sale became divisible as personalty, they were liable to legacy duty. See *Re Evans*, 2 C. M. & R. 206; *A.-G.* v. *Mangles*, 5 M. & W. 120; *A.-G.* v. *Simcox*, 1 Ex. 749; *Mules* v. *Jennings*, 8 Ex. 830; 2 Wms. Exors., pt. iii. bk. v. ch. ii. pp. 1628–1630, 7th ed.; Hanson, Death Duties, 518, 4th ed.

(*l*) Stat. 55 Geo. III. c. 184, Sched., pt. iii. These duties were first imposed by stat. 45 Geo. III. c. 28; 2 Wms. Exors., pt. iii. bk. v. p. 1583, 7th ed.

(*m*) *Noel* v. *Henley*, 7 Price, 253.

(*n*) Stat. 45 Geo. III. c. 28, s. 5.

(*o*) *A.-G.* v. *Jackson*, 2 Cr. & Jer. 101; *Stow* v. *Davenport*, 5 B. & Ad. 359.

(*p*) Hanson, Death Duties, 441, 4th ed.

(*q*) Stat. 51 Vict. c. 8, s. 21 (2).

(*r*) A gift of the residue, after payment of debts or other charges, of the moneys to arise from the sale of real estate directed by will to be sold (above, p. 200), would be a legacy.

right or power to charge, burden or affect with the payment of money, or out of or upon any moneys to arise from the sale, mortgage or other disposition of any such real or heritable estate or any part thereof: but succession duty shall be levied and paid in respect of every such legacy as a succession to personal property. Legacy duty is properly payable by the executor before the legacy is paid or satisfied (*s*). But if a legatee be put into possession of the property bequeathed to him, without payment of the legacy duty, he will become liable to the Crown for the duty (*t*). And a purchaser from such a legatee incurs a like liability (*u*). Purchasers from legatees of property subject to legacy duty should therefore require production of the receipt for payment of the duty. But purchasers from executors selling under their general power to dispose of the testator's personalty are not concerned to inquire as to the payment of legacy duty (*x*).

Succession duty.

Succession duty was made payable by the Succession Duty Act, 1853 (*y*), in respect of the succession on death on or after the 19th of May, 1853, to the beneficial interest in any real or personal property (*z*), or the income thereof, either by virtue of any disposition of the property or on devolution by law (*a*): except in cases where legacy duty was already chargeable in respect of the succession (*b*). It is the disposition or devolution giving rise to the succession (not the succession itself) which creates the liability to succession

(*s*) Stat. 36 Geo. III. c. 52, ss. 6, 36.

(*t*) Sect. 6.

(*u*) *Bryan* v. *Mansion*, 3 Jur. N. S. 473; Hanson, Death Duties, 409.

(*x*) See above, p. 200.

(*y*) Stat. 16 & 17 Vict. c. 51.

(*z*) In the construction, and for the purposes of this Act, the term *real property* includes leasehold hereditaments, and the term *personal property* does not; sect. 1.

(*a*) Sects. 2, 10, 54.

(*b*) Sect. 18. But leaseholds, as we have seen, were made chargeable with succession duty, instead of legacy duty.

duty (*c*): but no duty is payable in respect of any interest in property until some person has become entitled thereunder in possession (*d*). If therefore lands be settled on one for life with remainder in tail or in fee, a liability to succession duty on the death of the tenant for life is immediately created: but the duty is not payable until his death (*e*). Succession duty of

Lands settled for life and over.

(*c*) See sect. 2, which is in these words:—"Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." By sect. 10, duty is charged on such "successions" at the following rates:—Where the successor is to the predecessor—

(1) Lineal issue or ancestor, 1*l.* per cent.
(2) Brother or sister, or descendant of a brother or sister, 3*l.* per cent.
(3) Brother or sister of the father or mother, or descendant of such brother or sister, 5*l.* per cent.
(4) Brother or sister of the grandfather or grandmother, or descendant of such brother or sister, 6*l.* per cent.
(5) In any other degree of collateral consanguinity, or a stranger in blood, 10*l.* per cent.

A person chargeable with succession duty, who shall have been married to any wife or husband of nearer consanguinity than himself or herself to the predecessor, pays the same rate of duty only as such wife or husband would have been chargeable with; sect. 11.

No succession duty is payable where, if the succession were a legacy, the successor would be exempt from legacy duty (as on a succession by a husband to a wife, or *vice versâ*, or by any member of the royal family); or where the whole succession or successions derived from the same predecessor and passing on any death to any person or persons shall not amount in money or principal value to 100*l.*; see sect. 18; stats. 55 Geo. III. c. 184, Sched., pt. iii.; 52 Vict. c. 7, s. 10 (2).

Property subject to charitable or public trusts.

Where property becomes subject to a trust for any charitable or public purposes under any disposition which, if made in favour of an individual, would confer on him a succession, succession duty is payable in respect of such property, upon its becoming subject to such trusts, at the rate of 10*l.* per cent. on the amount or principal value thereof; stat. 16 & 17 Vict. c. 51, s. 16.

(*d*) Stat. 16 & 17 Vict. c. 51, s. 20.

(*e*) See sects. 15, 20.

Devise or descent.

Joint tenants beneficially entitled.

Exercise of powers of appointment.

Increase of benefit by extinction of charge, &c.

Succession subject to prior charge, &c. not created by the successor.

course becomes chargeable on a testator's death in respect of the devise of any beneficial interest he had in any real or leasehold property, or if a man die intestate, in respect of the devolution of his real estate to the heir or of his leaseholds to the persons entitled under the Statutes of Distribution (*f*). The duty is also payable on succession to any beneficial interest in any property by reason of the survivorship prevailing in the case of persons jointly entitled (*g*). And succession on death under an exercise of a power of appointment, whether general or limited, is as well chargeable with duty as succession under a direct disposition (*h*). Succession duty is further payable in respect of the increase of benefit accruing to any person upon the extinction or determination of any charge, estate or interest, to which his property is subject, and which is determinable by the death of any person or at any period ascertainable only by reference to death (*i*); for example, on the cesser by death of a rentcharge granted to one for life. And if property, in respect of which succession duty is payable, be subject to any prior charge, estate or interest not created by the successor himself, by reason whereof the successor shall not be presently entitled to the full enjoyment or value thereof, the duty in respect of the increased value

(*f*) 22 & 23 Car. II. c. 10; 1 Jac. II. c. 17, s. 7.

(*g*) Stat. 16 & 17 Vict. c. 51, s. 3.

(*h*) Succession under powers of appointment is provided for partly by sect. 2 and partly by sect. 4; see notes thereto in Hanson's Death Duties, 575 *sq.*, 594 *sq.*, 4th ed.; *Re Lovelace*, 4 De G. & J. 340. In the case of limited powers, the succession is deemed to be derived from the donor of the power as predecessor; sect. 4. And the general rule is the same in the case of general powers; *Charlton* v. *A.-G.*, 4 App. Cas. 427. But by sect. 4, on the exercise of a general power which has taken effect on a death occurring after the commencement of the Act, the appointor is to be deemed to be entitled to the property appointed as a succession derived from the donor of the power. If in such a case the appointment be made to take effect on a death (as if it be exercised by will or being exercised by deed its operation be suspended until the determination of some life interest), the appointee will take the property as a succession derived from the appointor: *A.-G.* v. *Upton*, L. R. 1 Ex. 224.

(*i*) Sect. 5.

accruing upon the determination of such charge, estate or interest shall, if not previously paid, compounded for or commuted, be paid at the time of such determination (*k*). And to prevent evasion of the Act, where any disposition of property, not being a *bonâ fide* sale and not conferring an interest expectant on death, has been made with the reservation or assurance of or contract for any benefit to the grantor or any other person for any term of life or for any other period ascertainable only by reference to death, succession duty is charged on the determination of such benefit in respect of the increase so caused of beneficial interest in the property (*l*); and succession duty is made payable, where any disposition of property has been made to take effect at a period ascertainable only by reference to the date of the death of any person dying on or after the 19th of May, 1853, and also where any disposition of property purports to take effect presently or under such circumstances as not to confer a succession, but by the effect or in consequence of any engagement, secret trust, or arrangement capable of being enforced in a court of law or equity, the beneficial ownership of such property shall not *bonâ fide* pass according to such disposition, but shall in fact devolve to any person on death, or at some period ascertainable only by reference to death (*m*).

Disposition reserving benefit to the grantor for term of life.

Disposition to take effect at a period ascertainable only by reference to death.

Immediate disposition subject to secret arrangement that the beneficial ownership shall not pass till death.

Where any person shall take a succession under a disposition made by himself, then, if at the date of such disposition he shall have been entitled to the property comprised in the succession expectantly on the death of any person dying on or after the 19th of May, 1853, and such person shall have died during the continuance of such disposition, he shall be chargeable with duty on his succession, at the same rate as he would have been chargeable with if no such disposition had been made:

Succession under a disposition made by the successor himself.

(*k*) Sect. 20.
(*l*) Sect. 7. See *A.-G.* v. *Johnson*, 1903, 1 K. B. 617.
(*m*) Sect. 8.

but a successor shall not in any other case be chargeable with duty upon a succession taken under a disposition made by himself. And no person shall be chargeable with duty upon the extinction or determination of any charge, estate, or interest created by himself, unless at the date of the creation thereof he shall have been entitled to the property subjected thereto expectantly on the death of some person dying on or after the 19th of May, 1853 (*n*). The case contemplated by the former part of this enactment is illustrated by the resettlement of lands limited to a father for life, with remainder to his son in tail, the estate tail being assured by a disentailing deed, according to the regular practice, to such uses as the father and son shall jointly appoint, and the lands being limited by the resettlement to the father for life, with remainder to the son for life, with remainder to trustees for a term to raise portions for the son's younger children, with remainder to the son's first and other sons successively in tail. In such case, whatever were the date of the resettlement, if the father died on or after the 19th of May, 1853, the son succeeding him as tenant for life became liable to succession duty at the same rate as he would have paid if there had been no resettlement, all uses limited under the resettlement to arise after the father's death being regarded as taking effect out of the original estate tail and therefore as created by a disposition made by the son, whose estate tail was barred (*o*). The son's children therefore become liable to succession duty on his death, in respect of their estates or portions, as on a succession from their father; and if the son's issue should fail, and any collateral relations succeed to any estates or portions under limitations in their favour contained in the resettlement, they will in their turn be liable to succession duty according

Extinction of charge, &c., created by the successor himself.

Under a resettlement of lands by tenants for life and in tail.

All succeeding after the tenant for life take under a disposition by the tenant in tail.

(*n*) Stat. 16 & 17 Vict. c. 51, s. 12. As to the last proviso, see *Re Peyton*, 7 H. & N. 265.

(*o*) *A.-G.* v. *Sibthorp*, 3 H. & N. 424; *Braybrooke* v. *A.-G.*, 9 H. L. C. 150.

to the degree of their relationship to the tenant in tail. And if on a resettlement by tenants for life and in tail, the lands are limited to such uses as they shall jointly appoint or as other persons shall appoint, and any of such powers is afterwards exercised, all uses limited under the power to arise after the tenant for life's death are considered, for the purposes of succession duty, to take effect out of the estate tail and to be created by a disposition made by the tenant in tail (*p*).

Even though they take under powers created by the resettlement.

Where succession duty is payable on any personal property (other than leaseholds), it is to be assessed and paid in the same manner as if such personal property were a legacy bequeathed by the predecessor to the successor (*q*). If therefore the successor becomes absolutely entitled to such property, duty is chargeable on the principal value thereof (*r*); whilst in the case of annuities and successive interests the duty is chargeable as on legacies given in similar form (*s*). By the Succession Duty Act, the duty on a succession to real or leasehold property was made payable on the value (to be calculated according to the tables in the schedule to the Act (*t*)) of an annuity equal to the annual value (*u*)

Assessment of succession duty on personalty.

On real or leasehold property.

(*p*) *Re Peyton*, 7 H. & N. 265; *A.-G.* v. *Floyer*, 9 H. L. C. 477; *A.-G.* v. *Smythe*, ib. 497; *A.-G.* v. *Cecil*, L. R. 5 Ex. 275; *Charlton* v. *A.-G.*, 4 App. Cas. 427.

(*q*) Stat. 16 & 17 Vict. c. 51, s. 32.

(*r*) Stat. 36 Geo. III. c. 52, s. 23.

(*s*) Stat. 36 Geo. III. c. 52, ss. 8, 10—12, 14; *Cuddon* v. *Cuddon*, 4 Ch. D. 583; *A.-G.* v. *Aberdare*, 1892, 2 Q. B. 684.

(*t*) Stat. 16 & 17 Vict. c. 51, s. 31.

(*u*) As to the rules for ascertaining such annual value, see sects. 22, 25, 26, 28, 34. Where the annual value, at the time when the successor became entitled in possession, was nothing, it was held that no succession duty was payable; *A.-G.* v. *Sefton*, 11 H. L. C. 257. Succession duty is payable in respect of the successor's interest in the net proceeds of sale of any timber, trees or wood (not being coppice or underwood), comprised in the succession *and sold;* sect. 23. But where the successor sells the land and growing timber together, whether at one price or at separate prices, it is not the practice of the office to demand duty on the proceeds of the sale of the timber either from vendor or purchaser, or to demand duty if the purchaser subsequently cut the timber; Hanson, Death Duties, 669, 4th ed. Succession duty is not payable in respect of

Timber.

of such property during the successor's life, or for any less period during which he might be entitled; and the duty was required to be paid by eight equal half yearly instalments, commencing at the end of twelve months after the successor should have become entitled to the beneficial enjoyment of the property (*x*). But if the successor should die before all such instalments should have become due, then any instalment not due at his decease should cease to be payable; except in the case of a successor who should have been competent to dispose by will (*y*) of a continuing interest in such property, in which case the instalments unpaid at his death should be a continuing charge on such interest in exoneration of his other property, and should be payable by the owner for the time being of such interest (*z*).

Where the successor is a corporation, &c.

But where any body corporate, company or society should become entitled, as successors, to any real or leasehold property, the duty in respect thereof was required to be assessed on the principal value of such property (*a*). And succession duty was made payable on the principal value of any property becoming subject on the death of any person to a trust for any charitable or public purposes (*b*). By the Finance Act, 1894 (*c*),

Property subject to public or charitable trusts.

Where succession

Advowson.

any advowson or church patronage comprised in any succession, unless the same or some right of presentation or other interest therein be disposed of for money or money's worth by or in concert with the successor, when he is chargeable with duty on the amount or value of the proceeds of such disposition; sect. 24.

(*x*) By stat. 51 Vict. c. 8, s. 22, the successor has the option of paying half the succession duty by four equal annual instalments, commencing at the end of a year after entering upon enjoyment, and the other half either upon the day of payment of the last of such instalments, or by four further annual instalments with interest at 4*l.* per cent. on the amount remaining unpaid.

(*y*) *A.-G.* v. *Hallett*, 2 H. & N. 368.

(*z*) Stat. 16 & 17 Vict. c. 51, s. 21; see sect. 1, above, p. 202, n. (*g*).

(*a*) Sect. 27. In such cases the duty was payable by the same instalments as upon a natural person's succession to an estate in fee simple.

(*b*) Sect. 16; above, p. 203, n. (*c*). This duty is apparently payable immediately and not by instalments; Hanson, Death Duties, 640, 4th ed.

(*c*) Stat. 57 & 58 Vict. c. 30, s. 18.

succession duty is now made payable on the principal value (less the estate duty created by that Act and the expenses of paying the same) of any real or leasehold property (*d*), if the successor is "competent to dispose of the property," that is to say, if he is a person having "such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail, whether in possession or not" (*e*). In such case the succession duty is made "a charge on the property" (*f*), and is payable by the same instalments and with the same interest as are authorized by the Act in the case of estate duty on real property (*g*).

duty now chargeable on the principal value of real or leasehold estate.

Succession duty is a first charge on the interest of the successor and of all persons claiming in his right in all the real or leasehold (*h*) property in respect whereof the duty is assessed; and is a first charge on the interest of the successor in the personal property (other than leaseholds) in respect whereof the duty is assessed, while the property remains in the ownership or control of the successor, or of any trustee for him or of his guardian or committee, or tutor or curator, or of the husband of any wife who is the successor. Succession duty is also a debt due to the Crown from the successor, having, in the case of real or leasehold property comprised in any succession, priority over all charges and interests created by him: but the duty does not charge or affect any other real or leasehold property of the successor than the

Charge of succession duty.

Succession duty a Crown debt.

(*d*) The Act says "real property": but it is presumed that, sect. 18 being an amendment of the Succession Duty Act, 1853, the terms used therein bear the meanings attached to them in that Act (see above, p. 202, n. (*z*)); although elsewhere in the Finance Act, 1894, the term *real property* is used in its usual and proper legal sense; see sect. 6.

(*e*) Sect. 22 (2*a*).

(*f*) Sect. 18; cf. the language of sect. 42 of the Succession Duty Act.

(*g*) Sect. 18; see sect. 6 (8), stated below.

(*h*) See sect. 1, above, p. 202, n. (*z*).

Where settled lands are sold under a power of sale.

property comprised in such succession. Where any settled real or leasehold property comprised in a succession is subject to any power of sale, exchange, or partition, exercisable with the consent of the successor, or by the successor with the consent of another person, he is not disqualified by the charge of duty on his succession from effectually authorizing by his consent the exercise of such power, or exercising any power with proper consent, as the case may be, and in such case the duty is charged substitutively upon the successor's interest in all real or leasehold property acquired in substitution for the property before comprised in the succession, and in the meantime upon his interest also in all moneys arising from the exercise of any such power, and in all investments of such moneys (*i*).

Persons accountable for succession duty.

The following persons, beside the successor, are personally accountable to the Crown for succession duty, but to the extent only of the property or funds actually received or disposed of by them respectively; that is to say, every trustee, guardian, committee, tutor, or curator, or husband, in whom respectively any property, or the management of any property, subject to such duty, is vested, and every person in whom the same is vested by alienation or other derivative title at the time of the succession becoming an interest in possession. All such persons are authorized to compound or pay in advance or commute any duty, and retain out of the property subject to any such duty the amount thereof, or to raise such amount, and the expenses incident thereto, at interest on the security of such property, with power to give effectual discharges for the same, and such security shall have priority over any charge or incumbrance created by the successor. In the event of the non-payment of such duty as aforesaid every person so made accountable will be a debtor to the Crown in the

(*i*) Sect. 42.

amount of the unpaid duty for which he is so accountable (*k*).

Duty on transmitted successions to personalty.

Where the interest of any successor in any personal property (other than leaseholds) shall before he shall have become entitled thereto in possession, have passed by reason of death to any other successor or successors, then one duty only shall be paid in respect of such interest, and shall be due from the successor who shall first become entitled thereto in possession; but such duty shall be at the highest rate which, if every such successor had been subject to duty, would have been payable by any one of them (*l*).

Duty payable in respect of interests transferred before the Succession Duty Act.

Where, at the commencement of the Succession Duty Act, any reversionary property expectant on death was vested, by alienation or other derivative title, in any person other than the person originally entitled thereto under any such disposition or devolution as is mentioned in the second section of this Act (*m*), the person in whom such property was so vested was made chargeable with duty in respect thereof as a succession at the same time and at the same rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created.

After the Act.

And where after the commencement of this Act, any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created.

Acceleration of title by surrender, merger, &c.

Where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if

(*k*) Sect. 44. (*l*) Sect. 14. (*m*) Above, p. 203, n. (*e*).

no such acceleration had taken place (*n*). For example, if land be limited to A. for life with remainder to B. in fee, succession duty will be payable on the death of A., but not till then; notwithstanding that A. release his life estate to B., or join with B. in selling and conveying, either by a direct grant of their estates or in exercise of a power created by such a grant, the land to C. in fee (*o*). Suppose also that in such case, no sale having been made, B. died before A. and his remainder in fee came by descent or devise to D., then no succession duty would be payable by D. until A.'s death, because until then he would have no interest in possession (*p*). But in this event, what duty would be payable by D.? It will be observed that the Act does not expressly provide for the case of a "succession" to real or leasehold property becoming vested in another, before falling into possession, by some title which *does* confer a new succession; as in the case put. It was considered by Jessel, M. R., that the intention of the Act was to impose one duty only in such cases chargeable on the successor, who actually became entitled in possession, according to his relationship to the predecessor, from whom he immediately derived his succession (*q*). But this construction of the statute was repudiated in the case of *Wolverton* v. *A.-G.* in the House of Lords (*r*), and was not followed in the case of *A.-G.* v. *Northumberland* (*s*). That was the case of a sale by A. and B., tenant for life and remainderman, in exercise of a power created by them, to C. in fee. C.

Succession devolving by title conferring a new succession.

(*n*) Sect. 15. This section has no application where estates for life and in fee in remainder limited in default of appointment are extinguished by an appointment to the remainderman; and in such case the former liability to succession duty is removed; *A.-G.* v. *Selborne*, 1902, 1 K. B. 388.

(*o*) See *Harding* v. *Harding*, 2 Giff. 597; *S.-G.* v. *Law Reversionary Interest Society*, L. R. 8 Ex. 233; *Re Cooper and Allen's Contract*, 4 Ch. D. 802, 825; *A.-G.* v. *Northumberland*, 1903, 2 K. B. 71.

(*p*) Above, p. 203.

(*q*) *Re Cooper and Allen's Contract*, 4 Ch. D. 802, 823, 826.

(*r*) 1898, A. C. 535, 551—554.

(*s*) 1903, 2 K. B. 71. affirmed 1904, 1 K.B. 762; 1905, ac 406.

died in A.'s lifetime, having devised the land to E., who thus becoming entitled in possession, paid duty as upon a succession from C. It was nevertheless held that, upon A.'s death, E. was liable to pay succession duty again, because the land was subject, by virtue of the disposition which limited the land to B. after A.'s death, to a liability to succession duty on that event (*t*), and could only be dealt with by A., B. or C. subject to this liability. It seems, therefore, that where land has been settled on A. for life with remainder to B. in fee, and this remainder has devolved by descent or devise on D. in A.'s lifetime, D. will on A.'s death be chargeable with the succession duty attaching on the land by virtue of the original settlement thereof on B., and also with the duty payable by virtue of the devolution or disposition of the land on or to himself from B.

Real or leasehold property settled on trust for sale.

The interest of any successor in moneys to arise from the sale of real or leasehold property under any trust for sale thereof, if not chargeable with legacy duty (*u*), is chargeable with succession duty as personalty; unless the moneys are subject to any trust for the re-investment thereof in the purchase of other real or leasehold property to which the successor would not be absolutely entitled, when they are chargeable with succession duty as realty (*v*). The interest of any successor in personal property (other than leaseholds), which is subject to any trusts for the investment thereof in the purchase of real or leasehold property, so far as the same is not chargeable with legacy duty, is chargeable with succession duty as personalty, if the successor would be abso-

Personalty subject to a trust for investment in real or leasehold property.

(*t*) Above, p. 202.

(*u*) Above, pp. 200, 201.

(*v*) Stat. 16 & 17 Vict. c. 51, s. 29. In the latter case, the successor's interest is considered to be of the value of an annuity payable during the period for which he is entitled and equal in amount to the income of the trust property in its actual state of investment at the time when the successor becomes entitled in possession.

lutely entitled to the purchased property: but if not, then as realty (*w*).

Power to compound or commute succession duty.

The Commissioners of Inland Revenue are authorized to compound any succession duty payable (*x*), to receive the same in advance at a discount (*y*), and at their discretion, on application made by any person who is entitled to a succession in expectancy or would be accountable for the duty if the same were then in possession, to commute the duty presumptively payable in respect of such succession for a certain sum to be presently paid (*z*).

Charge of succession duty formerly not barred by lapse of time.

May now be barred as against purchasers or mortgagees.

The Crown not being bound by the Statutes of Limitations as to charges on lands (*a*), its lien on any lands for succession duty was not formerly liable to be barred by lapse of time. But it is enacted by the Inland Revenue Act, 1889 (*b*), that, notwithstanding the 42nd section of the Succession Duty Act, 1853 (*c*), or any other provision contained in that Act, real property (*d*), or any estate or interest therein, shall not, as against a purchaser for valuable consideration, or a mortgagee, remain charged with or liable to payment of any sum for succession duty or temporary estate duty (*e*) after the expiration of six years from the date of notice to the Commissioners of Inland Revenue of the fact that the successor, or any person in his right or on his behalf, has

(*w*) Sect. 30. In the latter case the successor's interest is considered as equal to the value of an annuity payable during the period for which he is entitled and equal in amount to the income of the trust property in its actual state of investment at the time when the successor becomes entitled in possession.

(*x*) Sect. 39.

(*y*) Sect. 40.

(*z*) Sect. 41; stat. 43 Vict. c. 14, s. 11.

(*a*) Stats. 3 & 4 Will. IV. c. 27, s. 40; 37 & 38 Vict. c. 57, s. 8; Wms. Real Prop. 566, 19th ed.

(*b*) Stat. 52 Vict. c. 7, s. 12 (1).

(*c*) Above, pp. 209, 210.

(*d*) As this enactment is in effect an amendment of sect. 42 of the Succession Duty Act, 1853, it seems that the term "real property" must here include leaseholds; see above, pp. 202, n. (*z*), 209, n. (*d*).

(*e*) See below.

become entitled in possession to his succession or to the receipt of the income and profits thereof, or from the date of the first payment by such successor or person of any instalment or part of the duty, in case the successor shall not have availed himself of the option given to him by the Inland Revenue Act, 1888 (*f*), or after two years from the time for the payment by such successor of the last instalment or part of the duty, if he has availed himself of such option, or, in the absence of any such notice or payment, after the expiration of twelve years from the happening of the event (whether before or after the passing of the Inland Revenue Act, 1889) which gave rise to an immediate claim to such duty, or if such period of twelve years expires within six years from the date of the passing of this Act, then after the expiration of six years from the last-mentioned date (*g*).

Conveyancer's duty as regards succession duty.

Succession duty being made a charge, as above mentioned (*h*), on the successor's interest in any real or leasehold property, the conveyancer advising on title should of course call for the production of the receipts for succession duty in every case in which it appears from the abstract that such duty became payable. In the cases of succession to land upon death and intestacy,

Descent or devise.

(*f*) Above, p. 208, n. (*x*).

(*g*) By sect. 12 (2), the duty (if any) unpaid at the expiration of such period of six years or of twelve years or six years, as the case may be, shall be payable and paid by the successor or the persons mentioned as accountable in sect. 44 of the Succession Duty Act, other than the purchaser or mortgagee, and shall become charged substitutively upon any other estate or interest comprised in the succession of the successor remaining vested in him, or in any person in his right or on his behalf other than the purchaser or mortgagee, and in case of a mortgage upon the equity of redemption. By sect. 12 (2), the above enactment is not to lessen or affect any liability of any successor or accountable person, other than the purchaser or mortgagee, to payment of duty, whether out of money received on any sale or mortgage, or otherwise: but a purchaser or mortgagee shall not, for the purpose of obtaining the exemption conferred by the above enactment, be bound to see that the duty is discharged out of the money or other consideration paid or given as the consideration for the sale or mortgage.

(*h*) Above, p. 209.

or under a devise giving immediate possession on the testator's death, the liability to succession duty is a comparatively simple matter; as the duty then becomes payable and charged on the successor's interest directly after the death. But where lands are settled on one for life and others in remainder, the conveyancer must always have regard, not only to the duty, if any, payable when the tenant for life comes into possession, but also to that which will become payable on his death or on the death of any of the remaindermen entitled for life or in tail. As we have seen (*i*), the disposition creating the settlement gives rise to a liability to succession duty in respect of the estates limited by the settlement in remainder expectant on a death; and this liability at once attaches on such estates, as against all persons who may subsequently take them: although the liability is not required to be satisfied until the estate affected by it falls into possession. Thus the purchaser of an estate in remainder or reversion expectant on death takes subject to the liability to pay the succession duty when the estate shall fall into possession; and he cannot require the vendor, in the absence of special stipulation, to procure this liability to be discharged, the tax being regarded as an incident of the estate, not as an incumbrance (*j*). So when lands are sold by a tenant for life and remainderman in fee together, each conveying his own estate, the purchaser takes subject to the liability to succession duty on the death of the tenant for life, the time for payment of such duty not being accelerated by the merger of the life estate; and this is also the case where a tenant for life and remainderman in fee have created a joint power of appointment by grant of their estates and then conveyed to a purchaser in exercise of such

Where lands are settled for successive interests.

Liability to duty created by the disposition.

Sale of a remainder or reversion.

Sale by tenant for life and remainderman.

(*i*) Above, pp. 202, 203, 212, 213.
(*j*) *Cooper* v. *Trewby*, 28 Beav. 194; Re Rayington, 1904, 1 Ch. 811, 814.

power (*k*). In these cases, however, if the vendors simply contracted to sell an estate in fee without showing the liability to succession duty, the purchaser could require them to procure the duty to be commuted or otherwise to indemnify him against its payment (*l*). But if they contracted to sell as tenant for life and remainderman selling together, then it seems that the purchaser would have to bear the charge of succession duty, in the absence of stipulation to the contrary (*m*).

Sale of settled lands under a power of sale.

We have seen (*n*) that, where settled lands comprised in a succession are subject to a power of sale, which is exercised, any succession duty charged on the lands is to be charged substitutively on the successor's interest in all lands acquired with and interim investments of the purchase money. This provision seems to point only to such powers of sale as were usually contained in settlements before the Settled Land Act, 1882, took effect (*o*), where the purchase money is required to be laid out in buying other lands to be settled to the same uses. On the exercise of such a power, the purchaser takes the lands free from any succession duty then actually payable and charged on any estate defeated by the exercise of the power, as where the lands are sold before payment of all the instalments of the duty payable on the succession of a tenant for life in possession. The purchaser also takes the lands free from all liability to succession duty on the death of the tenant for life or any remainderman entitled under the settlement; because, by the exercise of such a power, all the estates limited by the settlement in default of appointment under the power of sale are utterly extinguished, so that nothing is left, to be charged with duty, of any

(*k*) See above, p. 212; *A.-G.* v. *Northumberland*, 1903, 2 K. B. 71. affirmed, 1905, ac. 406.

(*l*) See *Re Kidd and Gibbon's Contract*, 1893, 1 Ch. 695.

(*m*) 1 Dart, V. & P. 317.*

(*n*) Above, p. 210.

(*o*) Wms. Real Prop. 383, 19th ed.

* But see 2 Dart, V. & P. 667; Davies. Prec. Conv., vol 2, Pt. 1, pp 253, n., 313, n., 4th ed; Davies. Conv. Prec., 175 n, 18 ed.

estate so limited in remainder (*p*). It was held in one case, where lands subject to a jointure rentcharge were settled with a power of sale, so that the exercise of the power could not affect the jointure, and the lands were sold under the power, that the purchaser would take free from all claims for succession duty (*q*). This decision was pronounced by a late eminent conveyancer to be manifestly wrong (*r*); and it is obvious that there was a liability to succession duty, in respect of the cesser of the jointure (*s*), and that this liability was capable of attaching not only to the estates defeated but also to those estates limited by the exercise of the power. Still the liability did affect the estates limited by the settlement in default of appointment under the power of sale, although the duty was rather chargeable than actually charged thereon; and it is not altogether surprising that the judges considered that, according to the spirit of the Act, the duty in question was to be charged on the investments of the purchase money.

Sale under the Settled Estates Act.

When settled lands are sold under the powers conferred by the Settled Estates Act, 1877, the estates limited by the settlement are defeated in like manner as if the lands had been sold under an express power of sale (*t*); and charges and claims of succession duty are therefore charged substitutively on the investments of the purchase money to the same extent as on a sale under an express power (*u*). Sales made under the powers given by the Settled Land Act, 1882 (*v*), appear to have the same effect. Where lands have been assured to trustees upon trust for sale, whether by deed or will, any suc-

Sale under the Settled Land Act.

Trust for sale.

(*p*) *Re Warner's Settled Estates*, 17 Ch. D. 711, 713; and see *Ray* v. *Pung*, 5 B. & A. 561; *Doe* d. *Wigan* v. *Jones*, 10 B. & C. 459; *Skeeles* v. *Shearly*, 3 My. & Cr. 112; Sug. Pow. 478—481, 8th ed.; *A.-G.* v. *Selborne*, 1902, 1 K. B. 388.

(*q*) *Dugdale* v. *Meadows*, L. R. 9 Eq. 212; 6 Ch. 501.

(*r*) Davidson, Prec. Conv., vol. ii. pt. i. p. 313, 4th ed.

(*s*) See above, p. 204.

(*t*) Stat. 40 & 41 Vict. c. 18, s. 22.

(*u*) *Re Warner's Settled Estates*, 17 Ch. D. 711.

(*v*) See stat. 45 & 46 Vict. c. 38, ss. 3, 20.

cession duty, which may become payable by virtue of the disposition, will be chargeable on the successor's beneficial interests in the proceeds of sale (*w*), not on the lands assured. Any person purchasing lands from such trustees will therefore take them free from any charge of succession duty imposed on the purchase money, and appears to be under no obligation to see that any such duty is paid. If, however, the persons beneficially entitled under a trust for sale of lands should elect to take the lands *in specie*, the succession duty will then become charged or chargeable on their interests in the lands; and, as no person can by his own election diminish his liability to the Crown for duty, it appears that in such cases, wherever the successor would have been liable to succession duty on the principal value of his interest in the proceeds of sale, his interest in the lands elected to be taken *in specie* will be chargeable with no less an amount of duty (*x*). Here we may observe that the discharge from succession duty given in favour of a purchaser or mortgagee by the Inland Revenue Act, 1889 (*y*), at the end of twelve years after the duty became payable, is only accorded in the absence of notice to the Commissioners or payment of part of the duty. This raises the question whether, if such notice were received or payment made towards the end or even after the expiration of the period of twelve years, the time for extinguishing the charge would not start from the date of such notice or payment (*y*). It does not appear therefore that a conveyancer advising a purchaser can safely omit to inquire as to the payment of all succession duty, which became payable more than twelve years before the contract for sale. The proper course seems to be to call for the production of the receipts for such duty in the usual way. And

Election to take *in specie* lands assured on trust for sale.

(*w*) Above, pp. 209, 213.
(*x*) See *A.-G.* v. *Holford*, 1 Price, 426; above, p. 213.
(*y*) Stat. 52 Vict. c. 7, s. 12 (1); above, p. 214.

it is apprehended that the Act in question does not exonerate the vendor from the obligation of producing such receipts; he must prove the discharge of an incumbrance by payment, if he can. If he cannot, he may then allege that the defect is cured by a Statute of Limitations; and it will be for the purchaser's advisers to consider whether their client is protected by the Act.

Account duty.

Under the Inland Revenue Act, 1881 (*z*), as amended by the Inland Revenue Act, 1889 (*a*), certain voluntary dispositions of personal property, including leaseholds and the proceeds of sale of real estate settled on trust for sale (*b*), gave rise, on the death of the disposing party, to a liability to payment of stamp duty at the same rate as probate duty on the value of the property disposed of. These dispositions were (1) *Donationes mortis causâ* made by persons dying on or after the 1st of June, 1881; (2) any immediate gift, at law or in equity, not made *bonâ fide* twelve months before the donor's death (*c*); (3) any gift, whenever made, of any property, of which *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforth retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise (*d*); (4) any voluntary disposition (*e*) vesting any property in the disposer jointly with any other person so that the beneficial interest therein, or in some part thereof, passes or accrues by survivorship on the

(*z*) Stat. 44 Vict. c. 12, s. 38, passed 3rd June, 1881.

(*a*) Stat. 52 Vict. c. 7, s. 11, passed 31st May, 1889.

(*b*) *A.-G.* v *Dodd*, 1894, 2 Q. B. 150.

(*c*) Twelve was substituted for three by the Act of 1889. See *A.-G.* v. *Jacobs Smith*, 1895, 2 Q. B. 341.

(*d*) No. (3) was added by the Act of 1889. See *A.-G.* v. *Worrall*, 1895, 1 Q. B. 99.

(*e*) Including, by the Act of 1889, "any purchase or investment effected by the person who was absolutely entitled to the property, either by himself alone, or in concert or by arrangement with any other person." See *A.-G.* v. *Ellis*, 1895, 2 Q. B. 466.

disposer's death to such other person; (5) any voluntary settlement made by deed or other instrument not taking effect as a will, whereby an interest for life or determinable by death in the property settled is expressly or impliedly reserved to the settlor, or whereby the settlor has reserved to himself the right, by the exercise of any power, to restore to himself, or to retain the absolute interest in such property (*f*); (6) any declaration of trust in favour of a volunteer made, with like reservations in the settlor's favour, in writing or otherwise, notwithstanding in the case of a deed or other instrument, that the same was made for valuable consideration as between the settlor and some person other than the volunteer (*g*); and (7) any policy of assurance effected on a donor's life, and kept up, either wholly or partly, for the benefit of a donee, whether nominee or assignee (*h*). The duty so charged was commonly called account duty; because every person, who as beneficiary, trustee *or otherwise* acquired possession or assumed the management of any personal property included in any of the above-mentioned voluntary dispositions, was bound to deliver to the Commissioners of Inland Revenue an account of such property, duly stamped according to the amount of duty payable, within six calendar months after the death of the disposing party; on pain, in case of default, of being liable to pay double the duty as a debt to the Crown recoverable by any of the means in force for the recovery of probate, legacy or succession duties (*i*).

(*f*) See *Crossman* v. *R.*, 18 Q. B. D. 256; *A.-G.* v. *Heywood*, 19 Q. B. D. 326; *Re Croft*, 1892, 1 Ch. 652.

(*g*) The ordinary trusts in a marriage settlement of the wife's property for her next of kin, in default of children, fall under this description: *A.-G.* v. *Theobald*, 24 Q. B. D. 557. See also *A.-G.* v. *Chapman*, 1891, 2 Q. B. 526; *A.-G.* v. *Gosling*, 1892, 1 Q. B. 545; *A.-G.* v. *Jacobs Smith*, 1895, 2 Q. B. 341.

(*h*) Nos. (6) and (7) were added by the Act of 1889. No account duty was payable if the donee kept up the policy; *Lord Advocate* v. *Fleming*, 1897, A. C. 145.

(*i*) Stat. 44 Vict. c. 12, ss. 39, 40. Thus, the duty was payable by the donee not by the donor, or out of his estate; *Re Foster*, 1897, 1 Ch. 484.

Account duty was not otherwise charged on the property, in respect of which it might become payable: but it will be observed that purchasers acquiring possession of property subject to a claim for account duty might apparently be liable to pay the duty. Account duty was abolished by the Finance Act, 1894 (*k*), and estate duty substituted therefor, as regards deaths occurring *after* the 1st of August, 1894 (*k*).

Abolition of legacy and succession duty at 1*l* per cent., where probate or account duty paid—

And where estate duty paid.

Small estates.

Under the Inland Revenue Act, 1881, legacy or succession duty at the rate of 1*l.* per cent. (*l*) became no longer payable in respect of any property on the value of which either probate or account duty had been paid (*m*). And by the Finance Act, 1894 (*n*), legacy or succession duty at the rate of 1*l.* per cent. shall not be levied in respect of property chargeable with estate duty under that Act. By the same Acts certain small estates were exempted from the payment of legacy and succession duty (*o*).

Additional succession duty.

By the Inland Revenue Act, 1888 (*p*), additional succession duties were imposed on successions on deaths

(*k*) Stat. 57 & 58 Vict. c. 30, ss. 1, 24, and First Schedule.

(*l*) See above, pp. 200, n. (*f*), 203, n. (*e*).

(*m*) Stat. 44 Vict. c. 12, s. 41.

(*n*) Stat. 57 & 58 Vict. c. 30, ss. 1, 24, and First Schedule.

(*o*) By Stat. 44 Vict. c. 12, ss. 33, 36, where the gross value of the personal estate of a deceased person did not exceed 300*l.*, probate or administration might be granted on payment of a fixed stamp duty of 30*s.*, and such payment would be in full satisfaction of any claim to legacy or succession duty in respect of the same estate. By Stat. 57 & 58 Vict. c. 30, s. 16, where the gross value of the property, real or personal, in respect of which estate duty is payable on the death of a testator or an intestate, exclusive of property settled otherwise than by his will, does not exceed 500*l.*, probate or administration may be granted on payment of a fixed duty of 30*s.* or 50*s.*, according as the gross value does not or does exceed 300*l.*; and where the net value of such property does not exceed 1,000*l.*, and this fixed duty or estate duty has been paid thereon, no legacy or succession duties shall be payable under the will or intestacy in respect of the deceased person's estate.

(*p*) Stat. 51 Vict. c. 8, s. 21 (1). These duties were at the rate of 1*l.* per cent. on the succession of any lineal issue or ancestor and 1*l.* 10*s.* per cent. in other cases. See above, p. 203, n. (*e*).

occurring on or after the 1st of July, 1888; except in the case of leaseholds passing by will or devolution by law, or property on which account duty was payable. These duties were abolished by the Finance Act, 1894 (*q*), as regards deaths occurring after the 1st of August, 1894.

Temporary estate duty.

By the Inland Revenue Act, 1889 (*r*), a new duty, therein called estate duty, was temporarily imposed on or after the 1st of June, 1889, where the value of any property chargeable with probate or account duty exceeded ten thousand pounds, at the rate of 1*l.* per cent. on the value of such property. And the like duty was imposed, except in the case of leaseholds passing by will or devolution by law or of property on which account duty had been paid, where the value of any succession on the death of any person dying on or after the 1st of June, 1889, exceeded 10,000*l.*, or the value of any succession to real property under the will or intestacy of any person so dying, together with any other benefit taken by the successor under such will or intestacy, exceeded the same sum (*s*). The last mentioned duty was to be assessed and paid like succession duty, and was to be subject to the enactments relating to succession duty (*t*): but it was to be charged on the principal value of the property, to be ascertained as directed in the Act, where the successor was entitled in fee simple or in fee according to the custom of any manor, or for lives renewable under any custom or under any lease for lives, or for any estate in tail, or was entitled for life and was also competent to dispose as he should think fit of a continuing interest in the property (*u*). This duty

(*q*) Stat. 57 & 58 Vict. c. 30, ss. 1, 24, and First Schedule.

(*r*) Stat. 52 Vict. c. 7, s. 5.

(*s*) Sect. 6 (1—3).

(*t*) Sect. 6 (4).

(*u*) Sect. 6 (5, *a*). The duty might be chargeable on an increase of benefit accruing to the successor and chargeable with succession duty; sect. 6 (5, *b*); see above, p. 204.

where imposed on real property was made a first charge thereon, or on the interest of the successor therein, according as the duty was or was not chargeable on the principal value of such property (*v*). The temporary estate duties were abolished by the Finance Act, 1894 (*x*), as regards deaths occurring after the 1st of August, 1894.

Estate duty.

By the Finance Act, 1894 (*y*), a new duty called estate duty was imposed on the principal value (*z*) of all property, real or personal, settled or not settled, which passes on the death of any person dying after the 1st of August, 1894; and, as we have seen (*a*), probate duty, account duty, additional succession duty, temporary estate duty and legacy or succession duty at the rate of 1*l.* per cent. are not to be levied in respect of property chargeable with such new estate duty. Property (*b*) passing on the death (*c*) of a person so dying shall be

(*v*) Sect. 6 (6).

(*x*) Stat. 57 & 58 Vict. c. 30, ss. 1, 24, and First Schedule.

(*y*) Stat. 57 & 58 Vict. c. 30, ss. 1, 24. This Act has been amended by Stats. 59 & 60 Vict. c. 28, ss. 14—24; 61 & 62 Vict. c. 10, ss. 13, 14; 63 Vict. c. 7, ss. 11—14.

(*z*) See Stat. 57 & 58 Vict. c. 30, s. 7. Allowance is made, as a rule, for funeral expenses, debts and incumbrances; see *Cowley* v. *Inland Revenue Commrs.*, 1899, A. C. 198; *A.-G.* v. *Montagu*, 1903, 1 K. B. 483.* But allowance shall not be made (a) for debts incurred by the deceased or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bonâ fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit, and take effect out of his interest; see *Re Gray*, 1896, 1 Ch. 620; *Re Maryon-Wilson*, 1900, 1 Ch. 565; nor (b) for any debt in respect whereof there is a right to reimbursement from any other estate or person, unless such reimbursement cannot be obtained; nor (c) more than once for the same debt or incumbrance charged upon different portions of the estate. And see *Lord Advocate* v. *Maclachlan*, 1900, W. N. 204.

(*a*) Above, pp. 199, 222–224.

(*b*) The expression "property" includes real and personal property and the proceeds of sale thereof respectively, and any money or investment for the time being representing the proceeds of sale; sect. 22 (1, *f*).

(*c*) The expression "property passing on the death" includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation; and the expression "on the death" includes "at a period ascertainable only by reference to the death;" sect. 22 (1, *l*).

*A.G. v. Montagu, reversed, 1904, A.C. 316.

deemed to include (1) property of which the deceased was at the time of his death competent to dispose (*d*); (2) property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole; (3) property which would be required on the death of the deceased to be included in an account under sect. 38 of the Customs and Inland Revenue Act, 1881, as amended by sect. 11 of the Customs and Inland Revenue Act, 1889, if those sections extended to real as well as personal property, and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom (*e*); and (4) any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased (*f*). Property passing on the death of the deceased when situate out of the United Kingdom

(*d*) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail, whether in possession or not; and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos*, or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as tenant for life under the Settled Land Act, 1882, or as mortgagee; sect. 22 (2, *a*). A disposition taking effect out of the interest of the deceased person shall be deemed to have been made by him, whether the concurrence of any other person was or was not required; sect. 22 (2, *b*). And money which a person has a general power to charge on property shall be deemed to be property of which he has power to dispose; sect. 22 (2, *c*).

(*e*) See above, p. 220; *Grey* v. *A.-G.*, 1900, A. C. 124; *A.-G.* v. *Johnson*, 1903, 1 K. B. 617; *A.-G.* v. *Holden*, 1903, 1 K. B. 832.

(*f*) Sect. 2 (1). See *A.-G.* v. *Hawkins*, 1901, 1 Q. B. 285; *A.-G.* v. *Murray*, 1903, 2 K. B. 64; *A.-G.* v. *Murray*, 1904, 1 K. B. 165; *A.-G.* v. *Littledale*, 1905, 2 K. B. 323.

shall be included only if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes (*g*).

Exemptions from estate duty.
1. Trust property.

Estate duty is not payable under the Finance Act, 1894, in the following cases:—(1) In respect of property held by the deceased as trustee for another person, under a disposition not made by the deceased, or under a disposition made by the deceased more than twelve months before his death, where possession and enjoyment of the property was *bonâ fide* assumed by the beneficiary immediately upon the creation of the trust and thenceforward retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise (*h*). (2) In respect of property passing on the death of the deceased by reason only of a *bonâ fide* purchase from the person under whose disposition the property passes, or in respect of the falling into possession of the reversion on any lease for lives, or in respect of the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee (*i*).

2. Transactions for money consideration.

(*g*) Sect. 2 (2); see Wms. Pers. Prop. 432 and n. (*p*), 15th ed.; *A.-G.* v. *Jewish Colonization Assn.*, 1901, 1 Q. B. 123. This enactment exempts from the duty lands situate out of the country and passing as such (that is, in an unconverted state) on the death, whatever the form of tenure may be: but not the money secured by mortgage of lands abroad or the money which such lands represent, if converted in equity; *Lawson* v. *Commrs. of Inland Revenue*, 1896, 1. R. 418; W. N. 1896, p. 145; *Forbes* v. *Steven*, L. R. 10 Eq. 178; Hanson, Death Duties, 116, 4th ed.

(*h*) Sect. 2 (3).

(*i*) Sect. 3 (1). Where such purchase was made, or lease or annuity granted, for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee, the value of the con-

(3) In respect of the property of common seamen, marines, or soldiers, who are slain or die in the King's service. (4) In respect of sums under 100*l.* payable without requiring representation (*k*). (5) In respect of a single annuity not exceeding 25*l.*, purchased or provided by the deceased for the life of himself and of some other person and the survivor of them or to arise on his own death in favour of some other person (*l*). (6) If the Treasury remit the duty, as they lawfully may, in respect of such pictures, prints, books, manuscripts, works of art or scientific collections as appear to the Treasury to be of national, scientific or historic interest and to be given or bequeathed for national purposes, or to any university or to any county council or municipal corporation (*m*). (7) In respect of any pension or annuity payable by the Government of British India to the widow or child of any deceased officer of such Government (*n*). (8) In respect of any advowson or church patronage which would be free from succession duty (*o*). (9) Where the principal value of the estate does not exceed 100*l.* (*p*). (10) In respect of personal property settled by a will or disposition made by a person dying before the 2nd of August, 1894, in respect of which property probate or account duty has been paid or is payable; unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property (*q*). (11) Where an interest in expectancy in any property has, before the

3. Property of common seamen, &c.

4. Sums under 100*l.* payable without representation.

5. Single annuity of 25*l.*

6. Objects of national, scientific or historic interest given for national purposes, &c.

7. Indian Government pensions.

8. Advowson.

9. Estates not exceeding 100*l.*

10. Property settled by disposition of one dying before 2nd August, 1894, if probate or account duty paid or payable.

11. Where interest in

sideration shall be allowed as a deduction from the value of the property for the purpose of estate duty; sect. 3 (2). See *A.-G.* v. *Smith-Marriott*, 1899, 2 Q. B. 595; *A.-G.* v. *Johnson*, 1903, 1 K. B. 617.

(*k*) Sect. 8 (1); see Hanson, Death Duties, 164—167, 4th ed.

(*l*) Sect. 15 (1). If there is more than one such annuity, the annuity first granted is alone entitled to the exemption.

(*m*) Sect. 15 (2).

(*n*) Sect. 15 (3).

(*o*) Sect. 15 (4); see above, p. 207, n. (*u*).

(*p*) Sect. 17.

(*q*) Sect. 21 (1); *A.-G.* v. *Dodington*, 1897, 2 Q. B. 373; see above, p. 225, n. (*d*). By the Finance Act, 1896 (stat. 59 & 60

expectancy sold or mortgaged before 2nd August, 1894.

2nd of August, 1894, been *bonâ fide* sold or mortgaged for full consideration in money or money's worth, then no other duty on such property shall be payable by the purchaser or mortgagee when the interest falls into possession, than would have been payable if this Act had not passed; and in the case of a mortgage, any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee (*r*).

12. Settlement by husband or wife on the other of them before 2nd August, 1894.

(12) Where a husband or wife is entitled, either solely or jointly with the other, to the income of any property settled by the other under a disposition which has taken effect before the 2nd of August, 1894, and on his or her death the survivor becomes entitled to the income of the property settled by such survivor, estate duty shall not be payable in respect of that property until the death of the survivor (*s*). The following cases of exemption were added by the Finance Act, 1896 (*t*), with regard to deaths occurring on or after the 1st of July, 1896, namely:—

13. Reversion to settlor on settlement on himself for life and others, if falling in while settlor entitled in possession.

(13) Where property is settled by a person on himself for life, and after his death on any other persons with an ultimate reversion of an absolute interest or absolute power of disposition to the settlor, no estate duty is payable in respect of the enlargement of the settlor's interest by reason of the death of any such other person while the settlor remains in possession of the property as tenant for life (*u*).

14. Reversion on disposition to another or

(14) Where by a disposition of any property an interest is conferred on any person

Vict. c. 28, s. 21), where estate duty becomes payable in respect of any property passing under a settlement made before the 2nd August, 1894, and before that date additional succession duty, temporary estate duty, or legacy or succession duty at the rate of one per cent. has become payable under the instrument creating the settlement on the capital value of the property, the amount of any such duty so paid is to be deducted from such estate duty; *cf. Schmidt-Leabow*, 1905, 1 K.B. 98

(*r*) Stat. 57 & 58 Vict. c. 30, s. 21 (3). See below, p. 236, n. (*m*); *Re Vernon*, 1901, 1 Q. B. 297.

(*s*) Sect. 21 (5); held not to apply where the survivor becomes entitled to the capital of the property settled; *A.-G.* v. *Strange*, 1898, 2 Q. B. 39.

(*t*) Stat. 59 & 60 Vict. c. 28, s. 24.

(*u*) Sect. 14.

other than the disponer for the life of such person or determinable on his death, and such person enters into possession of the interest and thenceforward retains possession thereof to the entire exclusion of the disponer or of any benefit to him by contract or otherwise, and the only benefit which the disponer retains in the said property is subject to such life or determinable interest, and no other interest is created by the said disposition, no estate duty is payable on the death of such person in the disponer's lifetime by reason only of the property reverting to the disponer (*x*); and the law is the same where a similar disposition is made in favour of two or more persons, either severally or jointly or in succession (*y*): but this exemption is not given if the person or persons taking such life or determinable interests had at any time prior to the disposition been competent to dispose of the property (*z*). (15) No estate duty is payable where a husband entitled by law to the rents and profits of his wife's real or leasehold property dies in her lifetime (*a*). (16) Where any property passing on the death of a deceased person consists of such pictures, prints, books, manuscripts, works of art, scientific collections, or other things not yielding income as appear to the Treasury to be of national, scientific, or historic interest, and is settled so as to be enjoyed in kind in succession by different persons, such property shall, while enjoyed in kind by a person not competent to dispose of the same, be exempt from estate duty: but if such property be sold or come into the possession of some person competent to dispose of the same (*b*), it will become liable to estate duty (*c*). (17) By the Finance Act, 1900 (*d*), where any person dies from

others for life, if falling in in disponer's lifetime.

15. On death of husband entitled to wife's real or leasehold property in her lifetime.

16. Objects of national, scientific or historic interest, while kept in settlement.

17. Persons killed in war.

(*x*) Sect. 15 (1).

(*y*) Sect. 15 (2).

(*z*) Sect. 15 (3); see above, p. 225, n. (*d*).

(*a*) Sect. 15 (4).

(*b*) See above, p. 225, n. (*d*).

(*c*) Sect. 20.

(*d*) Stat. 63 Vict. c. 7, s. 14, which is to take effect in the case of any person dying since the 11th Oct. 1899.

wounds inflicted, accident occurring, or disease contracted, within twelve months before death, while on active service against an enemy, whether on sea or land, and was, when the wounds were inflicted, the accident occurred, or the disease was contracted, either subject to the Naval Discipline Act or subject to military law, whether as an officer, non-commissioned officer, or soldier, under Part V. of the Army Act, the Treasury may, if they think fit, on the recommendation of the Secretary of State or of the Admiralty, as the case requires, remit, or in the case of duty already paid repay, up to an amount not exceeding 150*l.* in any one case, the whole or any part of the death duties (*e*) leviable in respect of property passing upon the death of the deceased to his widow or lineal descendants if the total value for the purpose of estate duty of the property so passing does not exceed 5,000*l.*

Settled property.

Where property in respect of which estate duty is leviable, is settled (*f*) by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property (*g*), a further estate duty (called settlement estate duty (*h*)) on the principal value of the settled

Settlement estate duty.

(*e*) *I.e.*, estate, legacy, and succession duty, and also probate, account, additional succession and temporary estate duty.

(*f*) Settlement estate duty is payable where property is settled contingently only; *A.-G.* v. *Fairley*, 1897, 1 Q. B. 698; *A.-G.* v. *Clarkson*, 1900, 1 Q. B. 156; *Smith* v. *Lord Advocate*, 1902, W. N. 167. But by the Finance Act, 1898, where in the case of a death occurring on or after the 1st July, 1898, settlement estate duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen and cannot arise, the said duty so paid shall be repaid; stat. 61 & 62 Vict. c. 10, s. 14. Property is settled within the meaning of the Finance Act, 1894, when it is made subject to a disposition which would be a settlement within the meaning of the Settled Land Act, 1882; stats. 45 & 46 Vict. c. 38, s. 2; 57 & 58 Vict. c. 30, s. 22 (1, *h*, *i*); see *A.-G.* v. *Owen*, 1899, 2 Q. B. 253; *Re St. Albans*, 1900, 2 Ch. 873; *Re Campbell*, 1902, 1 K. B. 113.

(*g*) See above, p. 225, n. (*d*).

(*h*) Settlement estate duty is not payable in respect of property settled by a disposition

property shall be levied at the rate of one per cent. (*i*), except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased; but during the continuance of the settlement the settlement estate duty shall not be payable more than once (*k*). If estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty shall not, nor shall legacy or succession duty at the rate of one per cent., be payable in respect thereof, until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property (*l*), and who, if on his death subsequent limitations under the settlement take effect in respect of such property, was *sui juris* at the time of his death or had been *sui juris* at any time while so competent to dispose of the property (*m*). In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death (*n*). Where any lands or chattels are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession thereof is capable of alienating the same, whether his interest is in law a tenancy for

which has taken effect before the 2nd August, 1894; stat. 57 & 58 Vict. c. 30, s. 21 (4); or in respect of property settled by a will, where the net value of the property, on which estate duty is leviable (exclusive of property settled otherwise than by the will) does not exceed 1,000*l.*, and the fixed duty or estate duty has been paid thereon; sect. 16 (3); see above, p. 222 n. (*o*).

(*i*) See sect. 17. The amount of the *ad valorem* stamp duty, if any, charged on the settlement in respect of the settled property may be deducted; sect. 5 (4).

(*k*) Sect. 5 (1).

(*l*) See above, p. 225, n. (*d*).

(*m*) Sect. 5 (2), amended by stat. 61 & 62 Vict. c. 10, s. 13. See *A.-G.* v. *Hay*, 1899, 2 Q. B. 245; *Commrs. of Inland Revenue* v. *Priestley*, 1901, A. C. 208.

(*n*) Stat. 57 & 58 Vict. c. 30, s. 5 (3); *A.-G.* v. *Wood*, 1897, 2 Q. B. 102.

life or a tenancy in tail, the provisions of this Act with respect to settled property shall not apply, and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of estate duty, in like manner as for the purpose of succession duty (*o*). Settlement estate duty leviable in respect of a legacy or other personal property settled by will is payable out of the settled legacy or property in exoneration of the rest of the testator's estate; unless the will contain an express provision to the contrary (*p*).

Rate of estate duty.

The rate of estate duty is graduated according to the value of the estate as stated in the note (*q*); and for determining the rate of duty to be paid, all property passing on the death of the deceased and chargeable with estate duty is required, as a rule, to be aggregated so as to form one estate (*r*).

(*o*) Sect. 5 (5); above, pp. 207—209; Re Bolton Estate Act 1863, 1904, 2 Ch 259.

(*p*) Stat. 59 & 60 Vict. c. 28, s. 19 (1), reversing the rule in *Re Webber*, 1896, 1 Ch. 914; held not retrospective, *Re Gibbs*, 1898, 1 Ch. 625; but see *Re Maryon-Wilson*, 1900, 1 Ch. 565; *Re St. Albans*, 1900, 2 Ch. 873. *

(*q*) Where the principal value of the Estate						At the Rate per cent. of	
						£	s.
Exceeds	£100	and	does	not	exceed £500	1	0
,,	500	,,	,,	,,	1,000	2	0
,,	1,000	,,	,,	,,	10,000	3	0
,,	10,000	,,	,,	,,	25,000	4	0
,,	25,000	,,	,,	,,	50,000	4	10
,,	50,000	,,	,,	,,	75,000	5	0
,,	75,000	,,	,,	,,	100,000	5	10
,,	100,000	,,	,,	,,	150,000	6	0
,,	150,000	,,	,,	,,	250,000	6	10
,,	250,000	,,	,,	,,	500,000	7	0
,,	500,000	,,	,,	,,	1,000,000	7	10
,,	1,000,000	.....	.....	.....	.....	8	0

(*r*) Stats. 57 & 58 Vict. c. 30, ss. 4, 15 (2), 16 (3), 17: 59 & 60 Vict. c. 28, ss. 17, 20 (1); 63 Vict. c. 7, ss. 12, 13.

* Such still estate duty does not come under the head of duty ex?; Re King, 1904, 1 Ch 363. and see Re Cayley 1904, 2 Ch 781; Re Trombell, 1905, 1 Ch 726.

Persons accountable for estate duty.

The executor or administrator of the deceased is required to specify in appropriate accounts all the property in respect of which estate duty is payable upon the death of the deceased, and is accountable for the estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death, but is not liable for any duty in excess of the assets which he has received as executor or administrator or might but for his own neglect or default have received (*s*). Where property passes on the death of the deceased, and his executor or administrator is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property (*t*): but a *bonâ fide* purchaser for valuable consideration without notice is not rendered liable to or accountable for duty (*u*).

Estate duty when payable.

Estate duty in respect of all personal property of which the deceased person was competent to dispose (*x*) at his death is payable by his executor or administrator on delivering the affidavit necessary to obtain probate or administration; and the estate duty on any other property passing on the death may be paid by the executor or administrator at the same time, if the property be under his control by virtue of any testamentary disposition of the deceased or if the persons

(*s*) Stat. 57 & 58 Vict. c. 30, s. 8 (3).
(*t*) Sect. 8 (4).
(*u*) Sect. 8 (18).
(*x*) See above, p. 225, n. (*d*).

accountable for the duty so request (*y*). Otherwise the duty on such other property is to be collected upon an account setting forth the particulars of the property and to be delivered to the Commissioners by the person accountable for the duty within six months after the death or within such further time as the Commissioners may allow (*z*). Interest at the rate of three per cent. per annum is payable on the estate duty from the date of the death up to the date of the delivery of the affidavit or account or the expiration of six months after the death, whichever first happens (*a*). The duty to be collected upon an affidavit or account as before mentioned becomes due on the delivery thereof or on the expiration of six months from the death, whichever first happens (*b*).

Estate duty on real property.

But the duty due upon an account of real property may, at the option of the person delivering the account, be paid by eight equal yearly instalments, or sixteen half-yearly instalments, commencing at the end of one year from the death, with interest at the rate of three per cent. per annum, as from the time of payment of the first instalment, on the amount of duty for the time being remaining unpaid. The duty for the time being unpaid may however be paid at any time, with interest to the date of payment; and in case the property is sold, the duty and interest shall be paid on completion of the sale or shall be duty in arrear (*c*). Under the Finance Act, 1896 (*d*), the estate duty on annuities may be paid by four yearly instalments commencing at the end of a year from the death.

Charge of estate duty.

A rateable part of the estate duty on an estate in proportion to the value of any property which does not

(*y*) Stat. 57 & 58 Vict. c. 30, s. 6 (2); see also sect. 14.

(*z*) Sect. 6 (4).

(*a*) Sect. 6 (6), amended by stat. 59 & 60 Vict. c. 28, ss. 18, 40.

(*b*) Stat. 57 & 58 Vict. c. 30, s. 6 (7).

(*c*) Sect. 6 (8), amended by stat. 59 & 60 Vict. c. 28, s. 40.

(*d*) Stat. 59 & 60 Vict. c. 28, s. 16.

pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable; provided that the property shall not be so chargeable as against a *bonâ fide* purchaser thereof for valuable consideration without notice (*e*). A person authorized or required to pay the estate duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and any interest and expenses properly paid or incurred by him in respect thereof by the sale or mortgage of or a terminable charge on that property or any part thereof (*f*). And a person having a limited interest in any property, who pays the estate duty in respect of that property shall be entitled to the like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him (*g*).

Power to raise the money.

Charge in favour of limited owner paying the estate duty.

The Commissioners of Inland Revenue, on being satisfied that the full estate duty has been or will be paid in respect of an estate or any part thereof, shall, if required by the person accounting for the duty, give a certificate to that effect, which shall discharge from any further claim for estate duty the property shown by the certificate to form the estate or part thereof, as the case may be (*h*). And where a person accountable for the estate duty in respect of any property passing on a death applies after the lapse of two years from such death to the Commissioners, and delivers to them and verifies a full statement to the best of his knowledge and belief of all property passing on such death and the several persons entitled thereto, the Commissioners may

Certificate of discharge from estate duty.

(*e*) Stat. 57 & 58 Vict. c. 30, s. 9 (1). See *Re Parker-Jervis*, 1898, 2 Ch. 643; *Re St. Albans*, 1900, 2 Ch. 873.

(*f*) Sect. 9 (5).

(*g*) Sect. 9 (6). *

(*h*) Stat. 57 & 58 Vict. c. 30, s. 11 (1).

* See L. Advocate v Murray 1905 A.C. 531, 539; Re Shell 1905, 2 Ch 384.

determine the rate of the estate duty in respect of the property for which the applicant is accountable, and on payment of the duty at that rate, that property and the applicant so far as regards that property shall be discharged from any further claim for estate duty, and the Commissioners shall give a certificate of such discharge (*i*). Any certificate given as above mentioned shall not discharge any person or property from estate duty in case of fraud or failure to disclose material facts (*k*): but any such certificate purporting to be a discharge of the whole estate duty payable in respect of any property included in the certificate shall exonerate a *bonâ fide* purchaser for valuable consideration without notice from the duty, notwithstanding any such fraud or failure (*l*).

Commutation of estate duty on interest in expectancy.

The Commissioners are authorized in their discretion, upon the application of a person entitled to an interest in expectancy (*m*), to commute the estate duty, which would or might become payable in respect of such interest (*n*). And where it is difficult to ascertain exactly the amount of death duties (*o*) or any of them payable in respect of any property or any interest therein, the Commissioners are authorized, on the application of any person accountable for any duty thereon, to accept a sum to be assessed by them in full discharge of all claims for death duties in respect of such property or interest (*p*).

Composition for any death duties.

Estate duty as compared with succession duty.

It will have been observed that estate duty, like succession duty, becomes payable on the death of any

(*i*) Sect. 11 (2).
(*k*) Sect. 11 (3).
(*l*) Sect. 11 (4).
(*m*) This expression includes an estate in remainder or reversion, and every other future interest, whether vested or contingent, but not reversions expectant on the determination of leases; sect. 22 (1, *j*).
(*n*) Stat. 57 & 58 Vict. c. 30, s. 12.
(*o*) This includes all the duties mentioned above, p. 230, n. (*e*); sect. 13 (3).
(*p*) Sect. 13 (1).

person in respect of the property devised or bequeathed by his will or devolving by reason of his intestacy, and also on the death of any person entitled as tenant for life (*q*) or otherwise (for instance, as grantee of a rent-charge for life (*r*)) under a settlement in respect of the beneficial interest to which any other person succeeds on such death (*s*). But there is a marked difference between succession duty and estate duty in this; that the liability to succession duty is created by the disposition, whereby one becomes beneficially entitled to property on the death of another, whilst estate duty is charged in respect of the passing of property on a death (*t*). This causes a substantial distinction in the case of a settlement. Thus when lands are settled for successive estates for life or in tail, with an ultimate remainder in fee, succession duty is at once prospectively charged on the various beneficial interests limited to take effect on the deaths; and the liability to succession duty is not affected by the merger of any life estate (*u*). Estate duty, however, is not in any way charged on property so settled until it passes on some death. It was therefore held that, if the estate of a tenant for life under a settlement ceased in his lifetime by merger or otherwise, no estate duty would be payable on his death (*x*). But the rule so laid down is now modified by the Finance Act, 1900 (*y*), whereby in the case of every person dying after the 31st of March, 1900, property, whether real or personal, in which the deceased person or any other person had an estate or interest

(*q*) It has been held that in this case the property passes on the death of the tenant for life to the remainderman, and estate duty is payable under sect. 1 of the Finance Act, 1894, and not under sect. 2 (1, *b*) as on property in which the deceased had an interest ceasing on his death; *Cowley* v. *Inland Revenue Commrs.*, 1899, A. C. 198.

(*r*) See *Lord Advocate* v. *Maclachlan*, 1900, W. N. 204.

(*s*) See above, p. 225.

(*t*) Above, pp. 202, 224.

(*u*) Above, pp. 203, 212.

(*x*) *A.-G* v. *Beech*, 1899, A. C. 53; *A.-G.* v. *De Préville*, 1900, 1 Q. B. 223.

(*y*) Stat. 63 Vict. c. 7, s. 11.

limited to cease on the death of the deceased shall, for the purpose of the Finance Act, 1894, and the Acts amending that Act, be deemed to pass on the death of the deceased, notwithstanding that that estate or interest has been surrendered, assured, divested, or otherwise disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in such property, unless that surrender, assurance, divesting, or disposition was *bonâ fide* made or effected twelve months before the death of the deceased, and *bonâ fide* possession and enjoyment of the property was assumed thereunder immediately upon the surrender, assurance, divesting, or disposition, and thenceforward retained to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise (*z*). Again, estate duty, where made a charge, is charged on the property, in respect of which it is leviable (*a*): while succession duty is charged only on the successor's interest therein (*b*). And there is no provision similar to that made with regard to succession duty (*c*) and charging estate duty on the proceeds of sale of settled property sold under a power of sale. It appears, therefore, that if lands settled on one for life with remainder over be sold, either under a power of sale contained in the settlement, or under the Settled Estates Act, 1877, or the Settled Land Acts, and any unpaid estate duty be charged thereon, the purchaser must require this duty to be paid: otherwise the same will remain charged on the lands. For although the estate of those claiming under the settlement is destroyed by the exercise of the power (*d*), yet the charge given by the Finance Act, 1894, appears to be a charge on the lands, which is

Estate duty on sale of lands under a power.

(*z*) See above, pp. 220, 225.
(*a*) Above, p. 235.
(*b*) Above, p. 209.
(*c*) Above, p. 210.
(*d*) Above, pp. 217, 218.

paramount to any estate therein of any subject of the Crown. When therefore the lien of the Crown for estate duty has attached on any lands, it appears to remain, until discharged by payment, so long as any subject has any estate therein; thus it would affect all estates created by the exercise of any express or statutory power, or arising on the escheat of the lands to any mesne lord (*e*). But as no estate duty, which may become payable on a future death, is charged on any lands, a purchaser of lands settled on one for life with remainder over will take the lands free from any charge in respect of the estate duty, if any (*f*), which will become payable on the death of the tenant for life; and this appears to be the case whether the lands be conveyed to him under an express or a statutory power or by the tenant for life and remaindermen according to their estates therein (*g*). But if a remainder or reversion expectant on the determination of a life interest, other than a lease for lives (*h*), be sold, by itself and apart from the life interest, after the commencement of the Finance Act, 1894 (*i*), estate duty will become payable in respect of the property on the death of the tenant for life; and it appears that the purchaser will take subject to this liability, and must bear the expense of the duty, in the absence of stipulation to the contrary (*k*). The provisions of the Inland Revenue Act, 1889, barring the charge of succession duty after a certain lapse of time, in favour of a purchaser or mortgagee (*l*), are by the Finance Act, 1894 (*m*), directed to apply as if estate duty were therein mentioned as well.

On sale of remainder or reversion.

Charge of estate duty as against purchaser.

The Finance Act, 1894, does not make estate duty a

Estate duty not charged

(*e*) Cf. *Ellis* v. *R.*, 6 Ex. 921; Sug. V. & P. 521; and cases cited above, p. 197, n. (*l*).

(*f*) See above, p. 237.

(*g*) See *Cowley* v. *Inland Revenue Commrs.*, 1899, A. C. 198.

(*h*) See above, p. 226.

(*i*) See above, p. 224.

(*k*) See above, p. 216.

(*l*) Above, pp. 214, 219.

(*m*) Stat. 57 & 58 Vict. c. 30, s. 8 (1); see Hanson, Death Duties, 168, 171.

on property passing to executor, as such. Leaseholds.

charge upon property which passes to the executor or administrator as such (*n*); so that estate duty is not a charge on any personal estate, which belonged absolutely to a deceased person and passes by his will or upon his intestacy, including leaseholds (*o*) and his equitable interest transmissible as personalty in any real estate, which was prior to his death absolutely converted in equity into personal property (*p*). It will be remembered that the estate duty on such property is payable before the grant of probate or administration (*q*). There are conflicting decisions upon the question whether personalty appointed by will in exercise of a general power of appointment passes to the executor *as such*, and is so freed from any charge of estate duty (*r*); and until this question is settled, a purchaser of leaseholds so appointed must of course satisfy himself that the duty has been paid. The Act of course made estate duty a charge on all real estate passing by will or on intestacy (*s*). And it has been decided that in this respect the law has not been altered by the Land Transfer Act, 1897, under which a deceased person's real estate passes, as a rule, to his executors or administrators, like a chattel real, and such personal representatives have the same power to dispose of real estate as they have of chattels real (*t*). That Act provides that nothing in Part I. thereof shall affect any duty payable in respect of real estate (*u*). Executors or adminis-

(*n*) Above, pp. 234, 235.

(*o*) *Re Culverhouse*, 1896, 2 Ch. 251, deciding that the estate duty leviable in respect of leaseholds specifically bequeathed is payable out of the testator's general personal estate.

(*p*) *I.e.*, any interest in real estate so converted on which probate duty was formerly payable; above, p. 198.

(*q*) Above, p. 233.

(*r*) That it does not; *Re Treasure*, 1900, 2 Ch. 648; *Re Maddock*, 1901, 2 Ch. 372 (both Kekewich, J.); *Re Power*, 1901, 2 Ch. 659 (Byrne, J.): that it does; *Re Moore*, 1901, 1 Ch. 691; *Re Dixon*, 1902, 1 Ch. 248, 257 (both Buckley, J.); *Re Fearnsides*, 1903, 1 Ch. 250 (Swinfen Eady, J.).

(*s*) Above, pp. 234, 235.

(*t*) Above, pp. 189—193; *Re Palmer*, 1900, W. N. 9; *Re Sharman*, 1901, 2 Ch. 280.

(*u*) Stat. 60 & 61 Vict. c. 65, s. 5.

trators, who are now accountable as trustees (*x*) of any real estate vested in them under the Act for the estate duty leviable in respect thereof (*y*), are not therefore required to pay such estate duty before obtaining a grant of probate or administration, but have the option of paying the duty by instalments (*z*). And the duty is not payable out of the deceased person's general personal estate, as in the case of leaseholds, but ought to be satisfied out of the real estate itself (*a*), the persons beneficially entitled to the land devised (*b*) or descended bearing the actual burden of payment according to their interests therein (*c*). As estate duty still remains a charge on any real estate devised by will or descending upon death and intestacy, a purchaser thereof, whether from the deceased tenant's executors or administrator (*d*), or from the devisee or heir, should require the duty to be entirely discharged by the vendor before completing the sale (*e*). We may notice that, if the deceased person's estate were insolvent, no estate duty would be chargeable on his own property (*f*).

Lands devised on trust for sale.

Lands devised on trust for sale appear to be charged under the Finance Act, 1894, with the estate duty payable in respect thereof on the testator's death.

(*x*) Above, p. 223.

(*y*) *Re Adams*, Kekewich, J., 3rd Aug. 1898, A. 592, cited Brickdale & Sheldon's Land Transfer Acts, 250.

(*z*) *Re Sharman*, 1901, 2 Ch. 280, 283; see above, p. 234.

(*a*) *Re Sharman, ubi sup.*

(*b*) See above, pp. 190, 233—235.

(*c*) See *Re Jolley*, 17 Times L. R. 244; *Re Parker-Jervis*, 1898, 2 Ch. 643; *Re St. Albans*, 1900, 2 Ch. 873, 881.

(*d*) Above, p. 193. The Inland Revenue authorities at first considered that a sale of real estate by the personal representatives conveyed the same free from any charge of duty: but afterwards they asserted the contrary opinion; see 41 Sol. J. 308; 43 Sol. J. 765, 769, 812, 822; 44 Sol. J. 67, 72, 339, 343. There seems to be no doubt that the latter opinion is correct. An executor can sell leaseholds or other personalty free from any charge of duty, even before probate; above, pp. 192, n. (*n*), 199: but that is because probate duty was not and estate duty is not made a charge on such property. The Finance Act, 1894, contains no provision shifting the duty on a sale; and the Crown is not bound by the Land Transfer Act, 1897; above, pp. 197, 238.

(*e*) See above, p. 234.

(*f*) Above, pp. 207, n. (*n*), 224, n. (*z*).

Lands settled by deed on trust for sale.

Where lands have been settled by deed on trust for sale, so as to be converted in equity into money, and the proceeds of sale have been directed to be held in trust for one for life and others in succession, no estate duty is charged on the lands before the tenant for life dies; so that if a sale be made before such death, the purchaser takes the lands free from any claim of duty (*g*). If, however, the lands remain unsold until the death of the tenant for life, the estate duty becomes leviable, for which the trustees would be accountable (*h*). And as the Finance Act provides that the duty shall be a first charge on the property in respect of which it is leviable (*i*), it appears to be a charge on the lands. For until the lands be sold, what other property is there on which the duty can be a charge? It must be remembered too that in such cases the *cestui-que-trusts* are entitled usually by express declaration (*k*), but, if not, by implication (*l*), to the rents and profits of the lands until sale for the like estates as they enjoy in the income of the proceeds of sale. So that on the death of the tenant for life the property passes, or must be deemed to pass, as there is a cesser of an actual interest in the lands. It is this event which causes the liability to duty (*m*); and the person next entitled succeeds to a like interest in the lands until sale. These considerations also support the view that the duty is a charge on the lands (*n*). On a purchase, therefore, from trustees for sale, as the purchaser has notice from the fact of the land being settled on trust for sale that some person or persons must be beneficially entitled to the rents and profits thereof until sale, it appears that he is entitled to have the trusts of the purchase money sufficiently

(*g*) See above, p. 237.
(*h*) Above, p. 233.
(*i*) Above, p. 235.
(*k*) Williams on Settlements, 125.
(*l*) *Casamajor* v. *Strode*, 19 Ves. 390, n.
(*m*) Above, p. 224.
(*n*) As to the official view, see above, p. 241, n. (*d*).

abstracted to show that no charge of estate duty has attached thereon; and if it appear from such abstract that some person entitled for life under these trusts is dead, the purchaser should inquire as to payment of any estate duty leviable on such death and require it to be discharged. As we have seen (*o*), when an equitable interest in lands settled on trust for sale passes to the executor or administrator *as such*, there is no charge of estate duty either on the proceeds of sale or on the land itself.

Lands subject to a general power of appointment.

As we have seen (*p*), by the Finance Act, 1894, property passing on death is to be deemed to include property of which the deceased was at the time of his death competent to dispose by virtue of any estate or interest therein, or any general power exercisable by instrument *inter vivos* or by will, or both. If, therefore, any lands, whether freehold, copyhold or leasehold, be subject to a general power of appointment, which has not been validly exercised by instrument taking effect in the appointor's lifetime and in such a way as not to confer an interest arising on or by reference to the appointor's death (*q*), estate duty will be leviable in respect thereof on the appointor's death, whether he have exercised the power by his will or have not exercised it at all (*r*). In the case of real estate, such duty will be charged on the property (*s*). In the case of leaseholds the duty will be charged on the property, if the power were not exercised; but if it were, it is, as we have seen (*t*), a question whether the property does not pass to the executor as such, and so escape the charge of duty. And money which a person has a general power to charge on property is to be deemed

General power to charge land with the pay-

(*o*) Above, p. 240.

(*p*) Above, p. 225, and n. (*d*).

(*q*) Above, p. 224, n. (*c*).

(*r*) *Cowley* v. *Inland Revenue Commrs.*, 1899, A. C. 198, 213.

(*s*) Above, pp. 235, 240.

(*t*) Above, p. 240.

ment of money.

property of which he has power to dispose (*u*). This liability to estate duty must especially be borne in mind on the purchase from any person entitled in default of appointment to land made subject to a general power which has been extinguished by the appointor's death, whether the power were to appoint the land generally or to charge the same with the payment of money. Any property, whether real or personal, which is subject to a special power of appointment is chargeable with estate duty when it passes or is to be deemed to pass on death, either by virtue of an exercise of the power or in default of appointment (*x*): but not, as a rule, merely on account of the death of the appointor without exercising the power (*y*). If, however, the appointor were himself an object of the power, so that he could have appointed to himself some beneficial interest exceeding an estate for his own life in the property, it appears that estate duty will be leviable on his death although he should have made no appointment, for he was at the time of his death competent to dispose of the property for his own benefit; and where a man is empowered to appoint to himself, he has in effect a general power of disposition, since he may appoint to himself and then alien to any other person (*z*). Where a man has exercised a power of appointment or made any settlement or other disposition of property reserving a power of revocation, which is exercisable in his own favour, he appears to be competent to dispose of the property within the meaning of the Finance Act, 1894 (*a*), and estate duty is therefore chargeable on his death, if he die without exercising the power.

Property subject to a special power.

General power of revocation.

(*u*) Above, p. 225, n. (*d*).

(*x*) See above, p. 224.

(*y*) It does not appear that in this case the appointor or any person to whom he might have appointed would have had an *interest* in the property ceasing on the death of the deceased; see above, p. 225.

(*z*) See above, p. 225, and n. (*d*).

(*a*) Above, p. 225; see also pp. 221, 225, as to settlements reserving a power of revocation.

Death of joint tenant.

The reader may be reminded that estate duty is now payable on the death of any joint tenant beneficially entitled (*b*). And where a devise or bequest to any child or other issue dying in the lifetime of a testator is saved from lapse and takes effect by virtue of sect. 33 of the Wills Act (*c*), estate duty is payable, not only on the passing of the property by the testator's death, but also on the further devolution of the property from the dead child or issue to those who become entitled thereto under his will or intestacy (*d*). Estate duty is also leviable on the cesser by death of a contingent interest in any property to the extent to which any benefit thereby accrues or arises (*e*). As we have seen (*f*), estate duty is, as a rule, payable on the death of any tenant for life or life annuitant under a settlement of whatever date; but if the settlement were made before the commencement of the Finance Act, 1894, estate duty is not payable in respect of any personal property comprised therein on which probate or account duty has been paid, until the death of some person who was competent to dispose thereof. Thus, if realty and personalty, including leaseholds, were settled together by the will of a testator, who died before the Act, and a tenant for life or life annuitant under the settlement die after the Act, estate duty will be payable in respect of the settled realty only (*g*).

Devise to issue dying in testator's lifetime.

Cesser of contingent interest.

Death of life tenant under settlement made before the Finance Act, 1894.

Estate duty, how borne as between those beneficially entitled.

Where any property, real or personal, is charged with estate duty, the charge is in general upon the inheritance or *corpus* thereof; the executors or administrators, or the trustees, or else the persons beneficially entitled in possession (as the case may be), are accountable for

(*b*) See above, p. 225.
(*c*) Stat. 7 Will. IV. & 1 Vict. c. 26.
(*d*) *Re Scott*, 1901, 1 K. B. 228.
(*e*) Above, p. 225; *A.-G.* v. *Wood*, 1897, 2 Q. B. 102, 105—107.
(*f*) Above, pp. 227, 237, 242.
(*g*) *Berry* v. *Gaukroger*, 1903, 2 Ch. 116; *City & Suburban*, 1905, 1 K.B. 98.

and must pay or procure payment of the duty (*h*); but, as we have seen (*i*), the ultimate burden of payment is borne by the persons beneficially entitled in proportion to their respective interests. Thus, where estate duty becomes charged on land which is comprised in a settlement charging a jointure rent-charge and portions and subject thereto limiting a life estate with remainders over, the charge is upon the inheritance and is paramount to all these interests; but the payment of the capital sum leviable for estate duty falls upon the portioners and the remainderman in fee in proportion to the amount of the portions and the value of the land, whilst the interest payable in respect of the duty, if paid by instalments (*j*), and of any mortgage or charge necessary to raise the duty must be paid by the jointress and tenant for life proportionately, the jointress being treated as tenant for life of such a portion of the land (as valued for the purposes of the duty) as would produce an income equal to the amount of her jointure (*k*). And where any persons entitled to any annuity or capital sum charged on any property are so bound to bear the burden of any estate duty, the amount with which they are chargeable in respect of the duty may be deducted by the person accountable therefor before payment to them of the annuity or capital sum (*l*). This must be borne in mind in all dealings by such persons with their annuities or capital sums charged, whether by way of sale or mortgage. As we have seen (*m*), any person authorised or required to pay any estate duty may raise the amount necessary by sale or mortgage of the

(*h*) Above, pp. 233—235.

(*i*) Above, p. 241.

(*j*) Above, p. 234.

(*k*) *Re Parker-Jervis*, 1898, 2 Ch. 643; *Re St. Albans*, 1900, 2 Ch. 873; *Re Howe's Settled Estates*, 1903, 2 Ch. 69; *Berry* v. *Gaukroger*, 1903, 2 Ch. 116. The like law prevails with regard to settlements of personalty; *Re Orford*, 1896, 1 Ch. 257; *Re Meyrick*, 1897, 1 Ch. 99; *Re St. Albans*, *ubi sup.*

(*l*) *Re St. Albans*, 1900, 2 Ch. 873, 881.

(*m*) Above, p. 235.

property. And in the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise), under a disposition not containing any express provision to the contrary (*n*). Where any sum so charged is expressly made payable without any deduction, the person in whose favour the same is charged is not bound to bear any portion of the estate duty, which will then fall entirely on those interested in the property subject to the charge (*o*).

Where the property passing on death is not the whole estate or interest.

If the property which passes on the death be not the whole estate or interest in some land or chattel, as where an equity of redemption only so passes, the estate duty is charged on that property only, and not on the paramount estate or interest, such as the estate of the mortgagee (*p*). And there can be no doubt that in the example given the mortgagee exercising his power of sale could convey the property to a purchaser free from any charge of the estate duty which became payable in respect of the passing on death of the equity of redemption (*q*). So if an estate in remainder or reversion pass on death, that estate only appears to be chargeable with the estate duty, which is payable, at the option of the person accountable therefor, either immediately or when the estate falls into possession (*r*).

(*n*) Stat. 57 & 58 Vict. c. 30, s. 14 (1).

(*o*) *Re Parker-Jervis*, 1898, 2 Ch. 643; *Re Fitzhardinge*, 80 L. T. 376; *Re Maryon-Wilson*, 1900, 1 Ch. 565.

(*p*) See *Cowley* v. *Inland Revenue Commrs.*, 1899, A. C. 198; *A.-G.* v. *Montagu*, 1903, 1 K. B. 483. aff'd Montague, reversed, 1904 A.C. 316

(*q*) See *R.* v. *Lamb*, 13 Pri. 649.

(*r*) See Stat. 57 & 58 Vict. c. 30, ss. 5 (2), (3), 7 (6), 22 (1) (j); above, pp. 235, 236. It is a question whether, if land be settled on A. for life with remainder to B. in fee, and B. die before A., and his heir or devisee elect not

Certificate of discharge should be required.

Whenever any estate duty has become charged on any property, an intending purchaser or mortgagee thereof should require the production of a certificate of discharge of the duty (*s*), such certificate (and not the certificate of payment of (*t*) or the receipts for the duty) being the right evidence that the property is freed from the charge (*u*). It should be noted, however, that even a certificate of discharge is no evidence that the property is free from all incumbrance in respect of estate duty. As we have seen (*v*), where a person having a limited interest in any property pays the estate duty in respect thereof, he will be entitled *to the like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him.* It appears that this charge arises by the mere fact of such payment of the duty (*x*), and further that it confers a legal and not only an equitable interest on the chargee. It is necessary, therefore, on every sale or mortgage of land which has become chargeable with estate duty, not only to inquire whether the duty has been paid (*y*), but also to ascertain that there is no charge subsisting by reason of the duty having been paid by a person who had a limited interest in the land.

Charge where duty paid by person having a limited interest.

to pay the estate duty until A.'s death, the land can in A.'s lifetime be conveyed free from the charge of estate duty on a sale either by A. under the Settled Land Acts or in exercise of a power of sale contained in the settlement. It appears on principle that, if the duty be indeed charged on B.'s estate only, the land should, on a sale under either power, be freed therefrom and the charge shifted to the interest of B.'s heir or devisee in the proceeds of sale; above, pp. 217, 218, and n. (*p*); unless the application of the ordinary rule is excluded by the doctrine of the prerogative of the Crown; see *Ellis* v. *R.*, 6 Ex. 921, 926.

(*s*) See above, p. 235.

(*t*) See Stat. 57 & 58 Vict. c. 30, s. 9 (2).

(*u*) 1 Key & Elph. Prec. Conv. 448, n., 7th ed.

(*v*) Above, p. 235.

(*x*) See *Re Laurie*, 1898, W. N. 136; so held, R. Aldridge v. Murray 1905, 2 Ch. 531, 539.

(*y*) Above, pp. 140, 198.

CHAPTER VIII.

OF NOTICE OF TRUSTS AND SALES BY TRUSTEES.

§ 1. Of Notice of Trusts.
§ 2. Of Sales by Trustees.

In order to call attention to every point which may possibly come before a conveyancer for his consideration in advising on title, it would be necessary to give an exhaustive account of the whole of the English law of real property and chattels real. To this the present work makes no pretension, the writer's chief aim being to set forth the main principles of the law relating to sales of land. There are, however, various points arising on particular titles which are of sufficiently frequent occurrence to call for special mention; and it is now proposed to deal with these. We will begin in the present chapter with the subject of notice of trusts and sales by trustees. Next, we will treat of titles depending on the exercise of a power, especially the power of sale given by the Settled Land Acts; and then we will shortly consider a variety of miscellaneous matters such as sales of copyholds, of leaseholds, of lands situate in Middlesex or Yorkshire, and other special subjects.

§ 1.—*Of Notice of Trusts.*

Notice of trust.

We have seen (*a*), that whenever the purchaser's adviser obtains notice from any document or fact

(*a*) Above, p. 135.

appearing on the abstract or produced or elicited in the course of investigation of the title that a person entitled to some legal estate or interest in the property sold holds the same upon some trust (*b*) or subject to some equity, he must see that title is properly deduced through or from all persons beneficially entitled under the trust or equity, unless the circumstances be such that a good title can be made without the concurrence of the beneficiaries, as in the case of a trust for or power of sale. When lands are vested in trustees, it is frequently desired to keep notice of the trusts off the title. This is especially the case when mortgages are made to trustees; and it has been the regular practice, whenever a mortgage is held by trustees, to represent in the mortgage deed that they are jointly entitled in equity as well as at law (*c*); and also, when such a mortgage has had to be transferred to give effect to an appointment of new trustees, to frame recitals in the deed of transfer which shall not disclose the trust. Thus, if John and Thomas are trustees who have invested part of their trust money on mortgage, and Thomas wishes to retire from the trust, Charles being appointed in his place, Charles is duly appointed a trustee in the usual way, and then a separate deed is executed between the three whereby, after a recital that the principal money and interest now owing upon the security have become and are the property in equity of John and Charles, John and Thomas assign the mortgage debt and convey the mortgaged lands to John and Charles (*d*). It has

(*b*) Note that notice that the legal owner holds in trust is sufficient to put the purchaser upon inquiry, although the name of the *cestui que trust* or the purposes of the trust be not disclosed by the notice; *Bank of Montreal* v. *Sweeny*, 12 App. Cas. 617, 621, 622.

(*c*) This was done, before 1882, by the joint-account clause then usual, and has since been usually accomplished by the operation of sect. 61 of the Conveyancing Act of 1881; Wms. Real Prop. 550, 551, 19th ed.

(*d*) See Davidson, Prec. Conv. vol. ii. pt. ii. pp. 51—53, 805, 806, 4th ed.; 2 Key & Elph. Prec. Conv. 242, 243, 4th ed.

been held that, when recitals of this kind are met with, they may and indeed shall be accepted by a purchaser without inquiry (*e*). Conveyancers therefore, though of course they are well aware for what purpose such statements are made, do not seek to go behind them, and abstain from inquiries which, if answered, would oust their client from the position of a purchaser for value obtaining the legal estate in good faith without notice of any trust. The acceptance of such statements seems to rest on the presumption that all things have been rightly done (*f*). Thus, if A. and B., who have been parties to deeds which have conferred on them an absolute title at law to some land or mortgage money, choose to acknowledge that the land or money belongs in equity to C. absolutely, a purchaser from them is justified in accepting this acknowledgment as rightly made, and in assuming, without further evidence, that the whole beneficial title is, as stated, in C. And he is not bound to make and should refrain from making any further inquiry in the matter, such as whether the trust admitted by A. and B. in C.'s favour is declared by any document.* He is, it is conceived, justified in such circumstances in accepting a conveyance of the land or a transfer of the mortgage from A. and B., with the concurrence of C., without making any further investigation of C.'s title or as to the nature of the alleged trust. It is, of course, quite a different matter if some document be disclosed to the purchaser, showing that A. and B. are trustees of the land or money on certain particular trusts, as for C. for his life and after

(*e*) *Re Harman and Uxbridge, &c. Rail. Co.*, 24 Ch. D. 720, a very strong instance, as the recital which the Court compelled the purchaser to accept was not made by one who otherwise appeared to be absolutely entitled, but was a recital by an executrix, to whom her testator's estate had been given on trust for others, that *her testator* held the property in question as trustee for other persons, who were jointly entitled thereto.

(*f*) *Ante*, p. 97; *Re Cousins*, 31 Ch. D. 671, 675.

* See Re Thager & Randall & Tenl. 114 L.T.R 1076 (1916)

his death for his children. In that case the purchaser has notice of the trusts declared by the document, and must have regard to them; he is no longer entitled or bound to accept as correct any statement by A. and B. that they are jointly entitled in equity as well as at law or are trustees for C. On the contrary, the purchaser is entitled to require and should ask for all such information respecting matters connected with the trusts so disclosed as he could have demanded if no such statement had been made (*g*). For example, where a mortgage has been made to several persons jointly, and it is disclosed to a purchaser that they hold upon the trusts declared by a particular deed of settlement, it should be ascertained that these persons are or were the duly appointed trustees of the settlement and were empowered to invest their trust funds on mortgage and can give receipts for the mortgage money when repaid (*h*). And where land has been conveyed to several persons jointly in fee, and it is disclosed that they are trustees of some settlement, a purchaser from them must find out whether they are duly appointed trustees and were empowered to invest their trust funds in the purchase of land and are empowered to sell the land and can give good receipts for the purchase money; and if it appear that such powers have not been conferred upon them, he must require the concurrence of all persons beneficially entitled, and should not accept the title if this cannot be obtained or some beneficiary be under an insurmountable disability.

Circumstances may make disclosure of a trust unavoidable.

Where lands have been assured to several persons as joint tenants without disclosing the fact that they are trustees, circumstances may occur which will place the conveyancer engaged in investigating the title on behalf

(*g*) *Re Blaiberg and Abrahams*, 1899, 2 Ch. 340.
(*h*) See *S. C.*

of a purchaser in an awkward dilemma. Thus, if it appear on the face of the abstract that several persons were seised of lands in fee (not by way of mortgage), and one of them has died, the purchaser may of course require the usual proof of the discharge of the succession and estate duty which would be payable on the death if they were beneficially entitled (*i*). But if this be done, and the joint tenants were in fact trustees, the only answer that can be given will be that no duty became payable, because the deceased person was not beneficially entitled (*k*). This, however, is tantamount to notice that he was a trustee; and after such an answer the purchaser cannot safely accept the title without the concurrence of the persons beneficially interested (*l*). On the other hand, if no requisition as to succession or estate duty should be made, and the joint tenants should happen not to be trustees, and the duty had not been satisfied, the purchaser would take the property subject to the charge of duty (*m*). And the same difficulty may arise, as regards estate duty, in consequence of the death of one of several joint mortgagees: although with respect to succession duty the law is different. Thus, in such a case succession duty would be payable, if the mortgagees were beneficially entitled, by the survivors as on a succession to personal property; but the duty would not be a charge on the successors' interest, except while the property should remain in their ownership or control; and it does not appear that persons in whom the property (that is, the mortgage debt and the charge on the mortgaged lands) might become vested by alienation *after* the succession had become an interest in possession would be accountable for the duty (*n*). It appears,

(*i*) Above, pp. 204, 245.
(*k*) Above, pp. 202, 226.
(*l*) See 2 Dart, V. & P. 669; above, p. 250, n. (*b*).
(*m*) Above, pp. 209, 235.
(*n*) See Stat. 16 & 17 Vict. c. 51, ss. 42, 44; above, p. 209.

therefore, to be unnecessary for any person proposing to take from the survivors a transfer or release of the mortgage to inquire respecting the payment of such succession duty (*o*). But in the case of the estate duty which would be payable were the mortgagees beneficially entitled, it is at least a question whether persons in whom the mortgage should become vested by the alienation of the surviving mortgagees would not be accountable for the duty, and whether the property (which would not have passed to the deceased person's executor) would not be charged therewith (*p*). And if a person taking a transfer from such surviving mortgagees would be so accountable, or the duty be a charge on the mortgage debt, it seems that he ought to ascertain whether the duty has been discharged before he pays them the money owing on the security; and it is easy to put a case in which omission to make this inquiry might lead to a serious liability. Thus, suppose that a father and a son were joint mortgagees, who had made the investment with the view of the survivor becoming solely entitled, and the father died first: could any person safely take a transfer of the mortgage from the son without inquiring as to the payment of the estate duty? For if in this case the duty be indeed a charge on the property which passed on the father's death, then the mortgage debt and the mortgagee's estate in the mortgaged lands would appear to be as effectually charged therewith as if the two mortgagees had made a sub-mortgage of which the debtor had notice. And a similar difficulty arises where it is proposed to take

(*o*) Davidson, Prec. Conv. vol. ii. pt. ii. pp. 52, 53, 4th ed.; but see 2 Dart, V. & P. 669.

(*p*) See Stat. 57 & 58 Vict. c. 30, ss. 8 (4), 9 (1); above, pp. 233—235. It may be doubted whether sect. 8 (4), according to the strict grammatical construction of the words used, makes a person accountable in whom the property *shall become* vested by alienation made after the death, which gives rise to the liability to duty: but in Hanson's Death Duties, 174, 4th ed. it is asserted that it does.

a release or reconveyance by the survivor of two joint mortgagees appearing to be beneficially entitled. For if the estate duty which became payable on the death of one of the mortgagees be a charge on the *property* (that is, the mortgage debt and the mortgagees' estate in the lands), and the mortgagor or his successors in title have notice of the charge of duty, it does not appear that a release or reconveyance to him or them by the surviving mortgagee alone would vest in them the mortgagee's interest free from the charge of duty (if unpaid); and it seems that he or they might be held to be accountable for the duty as being a person or persons in whom the property had become vested by alienation (*q*). There seems to be no doubt that where a title is deduced through joint tenants appearing on the face of the deeds to be entitled for their own benefit, the only course which is perfectly safe is to treat them as being so entitled for all purposes, and consequently to require proof of the discharge of all death duties which if they were so entitled would be a charge on the property in the purchaser's hands. At the same time the writer believes that hitherto it has not been the practice to inquire respecting the payment of estate duty on the death of one of several joint mortgagees, unless there is good reason (as there would be in the case above put of a joint investment by father and son) to suppose that the parties are not or may not be trustees. The only justification for this course seems to be that joint mortgagees are so generally trustees

(*q*) See Stat. 57 & 58 Vict. c. 30, s. 8 (4); above, p. 254, n. (*p*). Where lands have been mortgaged to two persons jointly, the mortgagor and his successors in title are not accountable under the same sub-section, as being "trustees or other persons in whom any interest in the property is vested," for any estate duty which may have become payable on the death of one of the mortgagees; they are in the position of debtors; see *Matthew* v. *Northern Assurance Co.*, 9 Ch. D. 80. But if a debtor have notice of a charge created on the debt due from him, how can he safely pay the whole amount of the debt to the original creditor?

that the risk run in omitting the inquiry is really very small, and the inconvenience consequent upon asking is exceedingly great. Where several persons appear to have been entitled to lands as joint tenants, but not by way of mortgage, it has not been the practice to refrain from inquiry as to the discharge of any death duties which may have become payable on the death of one of them on the ground that they are likely to have been trustees: on the contrary, regard is had to the fact that omission to inquire as to the payment of estate or succession duty on the death of one of them would leave the purchaser with an unsatisfied charge on the face of his title, and so prevent him from getting a good marketable title (*r*).

Notice of a document, how far notice of its contents.

It is said, speaking generally, that notice of any document is notice of its contents: but this statement is only applicable as a rule subject to the following qualifications:—If a purchaser of any land have notice of some document, which must necessarily affect, or is stated to affect, the title to the land, then he ought to inquire as to its contents; and if he omit to prosecute this inquiry, he will be affected with notice of its contents and of any equitable interest disclosed by its contents. And if the document must necessarily affect

(*r*) Theoretically, omission to make the like inquiry with respect to estate duty payable on the death of a joint mortgagee leaves the title equally open to objection: but, as we have seen (above, p. 253), before the Finance Act, 1894, when succession duty only was payable, there was no necessity to make the inquiry, and the difference arising under that Act with respect to estate duty has hardly yet been appreciated by the profession generally. It should not be forgotten that joint mortgagees, who have been obliged to foreclose, or who have had to take possession and have acquired a title barring the equity of redemption under the Statute of Limitations, have become owners of the whole estate in the lands and not merely of a charge thereon; and on the subsequent death of one of them any succession duty which might become payable would be a charge on the survivors' estate in the lands, so that inquiry as to the payment thereof could no longer be safely dispensed with; Re Loveridge 1904, 1 Ch. 518.

the title, he will have notice of its contents (if he have notice of the document), notwithstanding that he were told that the document did not affect the title. But if the document be such as may or may not affect the title, and the purchaser ask, on receiving notice thereof, whether it does affect the title, and be told that it does not, he is justified, in the absence of any reason for suspecting the vendor's veracity or good faith, in accepting this statement as correct; and if he omit to peruse the document, he will not be fixed with notice of its contents or of any equity thereby disclosed (*s*). As already pointed out (*t*), however, it is imprudent not to require the production of a document, of which the purchaser has notice and which may or may not affect the title, because the document may disclose some *legal* estate or interest adverse to the vendor's title, and the purchaser would take subject to this, whether he had notice of the contents of the document or not.

Notice, actual or constructive.

Notice of trusts, equities or similar matters, may be either actual or constructive. Actual notice to the person principally concerned himself, as to a purchaser personally, calls for no remark; but it may be observed that the term "constructive notice" is applied to two kinds of notice, namely, the notice which is imputed to a person principally concerned where he acts through a solicitor or other agent, and the notice which is imputed to a person where he or his agent has not made such inquiry or investigation as ought to have been made. The

(*s*) *Jones* v. *Smith*, 1 Ph. 244, 253, 254; *Patman* v. *Harland*, 17 Ch. D. 353, 356, 357; *Lloyd's Banking Co.* v. *Jones*, 29 Ch. D. 221, 230; *English and Scottish Mercantile Investment Co.* v. *Brunton*, 1892, 2 Q. B. 1, 700.

(*t*) Above, p. 108.

*In Re Vallentine & Laundry co, 1903, 2 Ch 654, 659, sq.

law with respect to notice is now contained in the following section of the Conveyancing Act, 1882 (*u*):—

Restriction on constructive notice.

Sect. 3, sub-sect. 1.—A purchaser (*x*) shall not be prejudicially affected by notice of any instrument, fact or thing, unless—

(i) It is within his own knowledge, or would have come to his knowledge, if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(ii) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

Sub-sect. 2.—This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

Sub-sect. 3.—A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

Sub-sect. 4.—This section applies to purchases made either before or after the commencement of this Act; save that, where an action is pending at the commencement of this Act (*y*), the rights of the parties shall not be affected by this section.

Sub-sect. 1 (i) of the above enactment appears to be no more than a statement of the previously existing law (*z*). But sub-sect. 1 (ii) of the above section has made a substantial alteration of the law. Before this Act came into operation, it was necessary, as a general

(*u*) Stat. 45 & 46 Vict. c. 39, s. 3.

(*x*) By sect. 1 (2) (ii) in this Act "purchaser" includes a lessee or mortgagee, or an intending purchaser, lessee or mortgagee, or other person, who, for valuable consideration, takes or deals for property, and "purchase" has a meaning corresponding with that of "purchaser."

(*y*) Immediately after the 31st Dec. 1882; sect. 1 (2).

(*z*) *Bailey* v. *Barnes*, 1894, 1 Ch. 25, 35; see *Jones* v. *Smith*, 1 Hare, 43, 1 Ph. 244; *Wilson* v. *Hart*, L. R. 1 Ch. 463; *Carter* v. *Williams*, L. R. 9 Eq. 678; *Ratcliffe* v. *Barnard*, L. R. 6 Ch. 652; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135; *Patman* v. *Harland*, 17 Ch. D. 353; *Kettlewell* v. *Watson*, 21 Ch. D. 685.

rule, in order that a purchaser might be affected by notice to his counsel, solicitor, or other agent, that the agent should be affected with notice in the same transaction in which the question of notice to the principal arose (*a*). But where one transaction was closely followed by and connected with another, or where it was clear that a previous transaction was present to the mind of the agent when engaged in another transaction, the principal was affected by notice to the agent, although received in the previous transaction (*b*). This exception to the general rule has been removed by the above section. Thus, where A. first mortgaged his share under the trusts of a will to B., who was his solicitor and was also the solicitor of the trustees of the will, and this mortgage was afterwards transferred to C. and then to D., B. acting as C.'s and D.'s solicitor; and within a year after the transfer to D., A. mortgaged the same property to E., when B. acted as A.'s and E.'s solicitor; and E. was the first to give actual notice of his charge to the trustees, who had no personal knowledge of the previous mortgage: it was held that E. was not affected with notice of the previous mortgage by reason of B. having acted as his solicitor, and E.'s charge had accordingly priority over D.'s (*c*).

Reason for the rule that notice to the agent is notice to the principal.

The rule that a purchaser is affected by notice to his counsel, solicitor or other agent (*d*), seems to rest on this ground:—When a man employs such agents to transact his business he holds them out to the world as standing in his own place and representing himself, in fact, as being identical, for the purposes of the business which he has authorised them to transact, with his own person. He must therefore accept this representation of himself

(*a*) Sug. V. & P. 757.

(*b*) *Hargreaves* v. *Rothwell*, 1 Keen, 154, 159; Sug. V. & P. 757; see the cases stated below, pp. 261—264.

(*c*) *Re Cousins*, 31 Ch. D. 671; and see below, p. 264. *

(*d*) Sug. V. & P. 756.

* and see re Vallelord & Camden Co, 1903, 2 Ch 654, 663.

by another, which is the consequence of his own act in employing an agent, as complete for *all* the purposes of such business, and cannot justly be permitted to sever the identity of person created by him so as to repudiate notice or knowledge given to or acquired by the agent, but not in fact communicated to the principal (*e*). It is therefore said that, when the relation of principal and agent and the duty of the agent to communicate any matter to the principal have been established, an irrebuttable presumption arises that the agent communicated the matter to the principal—evidence is not admissible to prove that the agent did not in fact communicate his knowledge to the principal (*f*). The rule is, however, subject to the exception that, if the matter, of which it is sought to affect the principal with notice, be the agent's own fraud or fraudulent dealing or some equity arising thereout (*g*), or if the agent during the time of his employment as such, and when he acquired the information in question, was a party to a scheme of fraud (*h*), then the principal is permitted to give evidence to rebut the above presumption and to prove his ignorance of the matter; for the supposition that the agent communicated his own fraud to the principal is too improbable to be entertained even by a Court of Equity.

The exception in case of fraud.

Some very fine distinctions were taken with regard to the above rule and its exception, before the passing of the Conveyancing Act, 1882 (*i*). Thus it was decided that, where a solicitor has been or is acting fraudulently,

The law previous to the Conveyancing Act, 1882.

(*e*) See *Kennedy* v. *Green*, 3 My. & K. 699, 719; *Boursot* v. *Savage*, L. R. 2 Eq. 134; cf. *Blackburn* v. *Vigors*, 17 Q. B. D. 553, 12 App. Cas. 531; *Blackburn* v. *Haslam*, 21 Q. B. D. 144; Pennis v. Brown, 1895, 1 Ch. 637.

(*f*) Fry, J., *Kettlewell* v. *Watson*, 21 Ch. D. 685, 704—707.

(*g*) *Kennedy* v. *Green*, 3 My. & K. 699, 720; *Cave* v. *Cave*, 15 Ch. D. 639, 645.

(*h*) *Sharpe* v. *Foy*, L. R. 4 Ch. 35; *Re Southampton's Estate*, 16 Ch. D. 178, 184; Fry, J., *Kettlewell* v. *Watson*, 21 Ch. D. 685, 707.

(*i*) Above, p. 258.

but the circumstances are such that if the purchaser were represented by another solicitor innocent of the fraud, that solicitor would be put upon inquiry and so affected with notice of some equity other than that arising out of the fraud, the client will be affected with notice of this equity, notwithstanding the solicitor's fraud (*k*). And it was even held, that where in the same transaction a solicitor is engaged in committing a fraud, but has notice of some equity independent of that arising out of his fraud—as where he is a trustee engaged in wrongfully disposing of the trust property for his own benefit—any person who is his client in that transaction will be affected with notice of such independent equity, notwithstanding that, if the client were represented by another solicitor, that solicitor would not be put upon inquiry (*l*). And it was considered that, where the matter of which notice is sought to be imputed is not the solicitor's own fraud or unjust dealing, the mere fact that it was fraudulent or wrongful of the solicitor to conceal the matter from the client is not sufficient to exempt the client from the consequences of the rule (*m*). For example, where a solicitor fraudulently induced a client, who was a mortgagee of leaseholds, to execute (without receiving any money) a deed conveying the legal estate to him as upon a transfer of the mortgage, and having subsequently acquired the equity of redemption mortgaged the whole property to another, for whom he acted as solicitor in the transaction, it was held that the latter mortgagee was not affected with constructive notice of the solicitor's fraud on the original mortgagee. But, it appearing that the peculiar form of the deed of transfer of the mortgage and of the receipt endorsed thereon were sufficient to put a solicitor

Kennedy v. *Green.*

(*k*) See *Kennedy* v. *Green*, 3 My. & K. 699.

(*l*) See *Boursot* v. *Savage*, L. R. 2 Eq. 134.

(*m*) *Atterbury* v. *Wallis*, 8 De G. M. & G. 454, 466; *Rolland* v. *Hart*, L. R. 6 Ch. 678, 682, 683.

innocent of the fraud upon inquiry whether any money had been paid on the execution of the transfer, it was considered that the latter mortgagee was affected through the solicitor with notice of the equity arising from the fact that no money had been paid, notwithstanding the solicitor's fraud (*n*). So, where a solicitor, being one of three trustees entitled to certain leasehold land, the trust not being disclosed on the face of the title deeds, sold and assigned the land to a purchaser, for whom he acted as solicitor, by forging the signatures of his co-trustees to a letter of authority to sell and to the deed of assignment, and it was considered that the deed was a nullity on their part, but passed the legal estate in one-third of the land, the Court held that the purchaser was affected, through the solicitor, with notice of the trusts; for it was said that if the client would be affected with constructive notice of a trust, the existence of which is known to his solicitor, in the case where there was no fraud, the fact that the solicitor was committing a fraud in relation to the trust could not afford any reason why the client should not be affected with constructive notice of the existence of the trust (*o*). The application of the rule, where the solicitor had notice of some equity not arising out of his own fraud and the only fraud was in his concealment thereof from his client, is illustrated by the following cases:—A solicitor took a mortgage of an equity of redemption and sub-mortgaged it. Soon afterwards he and the first mortgagee and the mortgagor joined in a new mortgage of part of the property, he acting as solicitor of all the parties to the transaction and suppressing all mention of the sub-mortgage. It was held that the new mortgagee was affected, through the solicitor, with notice of the sub-mortgage; notwithstanding that it was fraudulent

Boursot v. *Savage.*

Atterbury v. *Wallis.*

(*n*) *Kennedy* v. *Green*, 3 My. & K. 699; see also *Re Southampton's Estate*, 16 Ch. D. 178, 184.

(*o*) *Boursot* v. *Savage*, L. R. 2 Eq. 134.

or wrongful of the solicitor to conceal the sub-mortgage from him (*p*). A solicitor entitled to an equitable interest in land in Middlesex mortgaged the same to A. by deposit of title deeds and letters of charge, which were not registered. He afterwards mortgaged the same interest by registered deed to B., for whom he acted as solicitor in the transaction. It was held that B. must be taken to have had notice of A.'s mortgage, the Court refusing to find a ground of exception from the general rule in the fact that it was to the solicitor's interest to conceal the prior mortgage from A., and declining to presume that in this conflict of interest and duty the solicitor consulted his own interest in preference to performing his duty to his client (*q*). The exception to the rule was allowed to prevail in *Sharpe* v. *Foy* (*r*), where a husband and wife mortgaged land, to which the wife was entitled at common law, but which was subject to a covenant for settlement. The same solicitor acted for the mortgagors and the mortgagee. The mortgagors informed the solicitor of the existence of the covenant, but it was agreed between them that the matter should not be mentioned to the mortgagee. It was decided that the mortgagee was not affected, through the solicitor, with notice of the covenant, as the solicitor was party to a scheme of fraud. Again, in *Cave* v. *Cave* (*s*), a solicitor, who was the sole trustee of a marriage settlement, wrongfully applied part of the trust funds in the purchase of certain land, which was conveyed to his brother. A. advanced to the brother 4,500*l.* on a first mortgage of this land. The solicitor acted for A. in this transaction, but represented to A. that his brother was the owner of the land, and that the mortgage contained absolute covenants for title by the

Bradley v. *Riches.*

Sharpe v. *Foy.*

Cave v. *Cave.*

(*p*) *Atterbury* v. *Wallis*, 8 De G. M. & G. 454; see also *Rolland* v. *Hart*, L. R. 6 Ch. 678.

(*q*) *Bradley* v. *Riches*, 9 Ch. D. 189.

(*r*) L. R. 4 Ch. 35.

(*s*) 15 Ch. D. 639.

brother. The solicitor also raised loans for his brother from other persons on mortgage of the same land. In these circumstances the Court found that the trust funds were applied in purchase of the land in pursuance of a scheme of fraud to which the solicitor was a party, his design from the first being to enable his brother to raise money on mortgage of the land; and it was held that A. was not affected, through the solicitor, with notice of the equities in favour of the *cestui-que-trusts* under the settlement.

Effect of the Conveyancing Act, 1882, s.3.

Section 3 of the Conveyancing Act, 1882 (*t*), preserves to principals the benefit of the exception established as above mentioned (*u*) in the case of the agent's fraud. But the distinctions drawn with regard to this exception have been greatly modified by the operation of sub-section (1) (ii) of the same enactment. Thus, in *Taylor* v. *London and County Banking Co.* (*x*), one Tasker had appropriated part of certain mortgages to which he was entitled in satisfaction of a breach of trust committed by him as trustee of the Brockman settlement. Afterwards, on the appointment of Nixon as a new trustee of the Tasker settlement, whereof Tasker had been previously sole trustee, and had apparently converted part of the trust funds to his own use, Tasker transferred these mortgages to Nixon and himself, representing that they were part of the funds subject to the trusts of the Tasker settlement; and in this business Tasker acted as Nixon's solicitor. It was argued for the persons entitled under the Brockman settlement (*y*), on the authority of *Boursot* v. *Savage* (*z*), that notice of the equity in their favour must be imputed to Nixon in consequence of Tasker having so acted as his solicitor.

(*t*) Above, p. 258.
(*u*) Above, p. 260.
(*x*) 1901, 2 Ch. 231.
(*y*) 1901, 2 Ch. 242.
(*z*) L. R. 2 Eq. 134; above, p. 262.

But it was held (*a*) that the doctrine laid down in *Boursot* v. *Savage* is now subject to the modifications introduced by the 3rd section of the Conveyancing Act, 1882 (*b*); and that, as knowledge of the appropriation to the Brockman settlement did not come to Tasker as Nixon's solicitor or in the same transaction in which the question of notice arose, Nixon could not be affected thereby. The principle of this decision appears to affect not only the case of *Boursot* v. *Savage*, but those of *Atterbury* v. *Wallis* and *Bradley* v. *Riches* (*c*) as well. For in neither of these cases was the knowledge sought to be imputed to the client acquired by the solicitor in his capacity of solicitor for that client or in the transaction in which the question of notice arose.

Vendor or mortgagor acting as purchaser's or mortgagee's solicitor.

As a general rule, a purchaser is affected by notice to his counsel, solicitor, or other agent, notwithstanding that the agent be also employed as the agent of the vendor (*d*) or be himself the vendor (*e*). But when the vendor is a solicitor or other agent, it must appear clearly that he acted generally as the solicitor or agent of the purchaser in the transaction, in order that the knowledge of the agent may be imputed to the purchaser. The purchaser will not be affected with notice if the vendor be merely employed to prepare the conveyance (*f*). The rule is the same between mortgagor and mortgagee (*g*).

What inquiries ought a pur-

It will be observed that, under the Conveyancing Act, 1882 (*h*), a purchaser will not be affected with

(*a*) 1901, 2 Ch. 257—259.
(*b*) Above, p. 258.
(*c*) Above, pp. 262, 263.
(*d*) *Le Neve* v. *Le Neve*, Amb. 436; *Dryden* v. *Frost*, 3 My. & Cr. 670; *Rolland* v. *Hart*, L. R. 6 Ch. 678.
(*e*) *Kettlewell* v. *Watson*, 21 Ch. D. 685.
(*f*) *Espin* v. *Pemberton*, 3 De G. & J. 547, 554; *Kettlewell* v. *Watson*, 21 Ch. D. 685.
(*g*) See the cases cited in the three preceding notes and above, pp. 261—264.
(*h*) Above, p. 258.

chaser to make?

notice of anything which would not have come to the knowledge of himself or his agent if such inquiries and inspections had been made by the one or the other as ought reasonably to have been made. The question then arises, what inquiries and inspections ought reasonably to be made? The answer to this appears to be: such inquiries and inspections as are usually made by a prudent purchaser buying under an open contract (*i*); for, as we have seen (*k*), a purchaser buying under special conditions limiting his right to investigate the vendor's title is fixed with constructive notice of all equitable incumbrances which he would have discovered if he had made such inquiries. And it should be noted that a purchaser or mortgagee taking the legal estate, but omitting to make reasonable and proper inquiries and inspections, will be affected with notice of such prior equities as he would have discovered if he had made such inquiries, although the omission to make the inquiries did not arise from any fraudulent motive, but was simply owing to gross negligence. Thus, where a purchaser bought land in good faith through an agent, who was not a solicitor, and required no abstract of title nor production of the title deeds, and the deeds were in the possession of an equitable mortgagee, it was held that the purchaser, to whom the legal estate had been conveyed, took the same with constructive notice of and subject to the charge created by the deposit of the deeds (*l*). Where, however, a purchaser makes due inquiry for the title deeds and a reasonable excuse is given for their non-production, he will not be affected with notice of any equity arising out of their absence, and may, if he

(*i*) *Wilson* v. *Hart*, L. R. 1 Ch. 463, 467; *Patman* v. *Harland*, 17 Ch. D. 353, 355—358; *Oliver* v. *Hinton*, 1899, 2 Ch. 264; see also *Molyneux* v. *Hawtrey*, 1903, 2 K. B. 487; Berwick v Price 1905, 1 Ch 632.

(*k*) Above, p. 173; see also *Taylor* v. *London and County Banking Co.*, 1901, 2 Ch. 231, 258.

(*l*) *Oliver* v. *Hinton*, 1899, 2 Ch. 264; Berwick v Price 1905, 1 Ch 632.

obtain the legal estate, avail himself of it and of the defence of purchaser for value in good faith without notice as against all persons asserting any such equity (*m*).

Notice that property is subject to charges or incumbrances.

Where a purchaser has notice that the property bought is subject to charges or incumbrances, he must inquire what these are, or he will be taken to have had notice of them all. Thus, where one took a legal mortgage from two partners of property formerly belonging to them and a third partner since retired as tenants in common, and the retiring partner had by deed conveyed his share in the property to the continuing partners "subject to all charges and mortgages affecting the same," and this deed was recited in the mortgage without the words in inverted commas, and the mortgagee, knowing of two equitable charges on the property and believing that these were all the incumbrances, made no inquiry whether this was the case or whether there were any other mortgages or charges, it was held that the mortgagee was affected with notice of a third equitable charge which existed on the property (*n*). So, where lands were mortgaged subject to land tax and tithe rentcharge and "to all other payments and outgoings, ecclesiastical or civil, charged upon or payable out of the said lands," and the mortgagee made no inquiry what other payments and outgoings there were to which the lands were subject, it was decided that he had constructive notice of an annual rent of a certain quantity of corn charged thereon in equity (*o*).

(*m*) *Hewitt* v. *Loosemore*, 9 Hare, 449, 458; and see *Hunt* v. *Elmes*, 2 De G. F. & J. 578; *Ratcliffe* v. *Barnard*, L. R. 6 Ch. 652; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135, 157; *Northern Counties of England Fire Insurance Co.* v. *Whipp*, 26 Ch. D. 482; *Re Ingham*, 1893, 1 Ch. 352. See also *Molyneux* v. *Hawtrey*, 1903, 2 K. B. 487.

(*n*) *Jones* v. *Williams*, 24 Beav. 47.

(*o*) *Re Alms Corn Charity*, 1901, 2 Ch. 750.

§ 2.—*Of Sales by Trustees.*

Sales by trustees.

The first observation to be made with regard to sales by trustees is that trustees holding the legal estate in lands under a simple trust for the benefit of some other person or persons have no power to sell without the consent of all the persons who are in equity beneficially entitled to the lands. In such cases the trustee is but an instrument to execute the will of *cestui-que-trust*. The latter may sell as he will, and the trustee is bound to convey at his bidding (*p*). But the trustee cannot bind any beneficiary by contract with or conveyance to any purchaser who has notice of the trust: although conveyance of the trust property by the trustee to a *bonâ fide* purchaser for value without notice of the trust may deprive *cestui-que-trust* of his equitable rights in the land (*q*). To enable trustees to sell lands without the concurrence of their *cestui-que-trusts* an express power to that effect must be inserted in the instrument creating the trust, or the lands must be vested in them upon a special trust for sale. When such powers of or trusts for sale are created they must be carried out in all respects according to the intention of their creator; they must not, for example, be exercised before the time at which it has been declared that they shall arise (*r*). Thus, when lands are vested in trustees on trusts for one for life, and after his death on trust for sale or on trust for others with power of sale, the trust for or power of sale cannot be validly exercised in the lifetime of the tenant for life—not even with his consent and concurrence (*s*), nor by order of the Court (*t*). But

Trusts for or powers of sale.

(*p*) See above, p. 131.

(*q*) Wms. Real Prop. 178, 179, 19th ed.

(*r*) See *Johnstone* v. *Baber*, 8 Beav. 233; Sug. Pow. 266, 8th ed.; Farwell on Powers, 147, 2nd ed.

(*s*) *Mosley* v. *Hide*, 17 Q. B. 91; *Want* v. *Stallibrass*, L. R. 8 Ex. 175; *Re Bryant and Barningham's Contract*, 44 Ch. D. 218; *Re Head's Trustees and Macdonald*, 45 Ch. D. 310. A sale may of course be made in such cases with the concurrence of all the beneficiaries, if *sui juris*, or the tenant for life may sell under the Settled Land Acts; see above, pp. 133, 144.

(*t*) *Blacklow* v. *Laws*, 2 Hare,

the intention of the author of a trust or power will be collected from the whole of the instrument creating the same, and may in some case be ascertained at the sacrifice of the literal interpretation of every expression therein contained. Thus, where lands were devised to one for life, and after her death to trustees to sell as soon as conveniently might be after the testator's death, it was held that the will in effect created a trust for sale immediately exercisable with the consent of the tenant for life (*u*). So a devise on trust to sell with all convenient speed and within five years after the testator's death has been held to enable the trustees to make a good title to a purchaser after the five years had expired, the testator's expressions being considered to be merely directory and not imperative (*x*). A trust for sale with all convenient speed nevertheless allows the trustees to exercise a reasonable discretion as to the time of sale (*y*), and they may postpone the sale if such a course be beneficial to their *cestui-que-trusts* (*z*). But trustees for immediate sale, who postpone sale indefinitely without good reason, will be accountable for any loss thereby caused to the trust estate (*a*).

Acceleration of time for exercising a

When lands are settled on several persons for successive life estates, with power for each tenant for life

40; *Johnstone* v. *Baber*, 8 Beav. 233; *Gosling* v. *Carter*, 1 Coll. 644, 652; Carleton v Trustees L.R. 20 Eq 578.

(*u*) *Mills* v. *Dugmore*, 30 Beav. 104.

(*x*) *Pearce* v. *Gardner*, 10 Hare, 287; see also *Cuff* v. *Hall*, 1 Jur. N.S. 972, where a will conferred a power to postpone sales, but not for a longer period than ten years from the testator's death.

(*y*) *Buxton* v. *Buxton*, 1 My. & Cr. 80, 93; *Marsden* v. *Kent*, 5 Ch. D. 598. For the purpose of determining the respective rights of tenant for life and remainder-man, one year is considered to be the time within which such a trust might reasonably have been exercised; *Parry* v. *Warrington*, 6 Madd. 155; *Vickers* v. *Scott*, 3 My. & K. 500.

(*z*) *Morris* v. *Morris*, 4 Jur. N.S. 802.

(*a*) *Cuff* v. *Hall*, 1 Jur. N.S. 972; *Devaynes* v. *Robinson*, 24 Beav. 86; *Fry* v. *Fry*, 27 Beav. 144. See *Re Davidson*, 11 Ch. D. 341, 348, on the question how far concurrence in the postponement of a sale directed to be made with all convenient speed may amount to an election by the beneficiaries to take the property *in specie*.

power or trust.

when in possession to charge the estate with a jointure or portions, it appears that, as such charges are a burden on the remainderman, the time for exercising the power cannot be accelerated by the surrender to any tenant for life of a life estate prior to his own; he must wait, before he can well exercise the power, until the time has arrived when he would have become entitled in possession according to the limitations of the settlement. But where lands are so settled with a power of sale exercisable with the consent of the tenant for life in possession, the power, being merely administrative and only altering the state of investment of the trust property and not diminishing the remainderman's interest, may be exercised with the consent of a tenant for life in actual possession, although so entitled through the surrender of a prior life estate (*b*). Where lands are vested in trustees on trust for one for life and after his death on trust for sale or on trust for others with power of sale, so that the settlor's intention is that the trust or power shall not arise until such death (*c*), the time for exercising the same cannot be accelerated by a surrender of the life interest (*d*).

Trusts for sale and settlement of the purchase money.

When lands are settled by deed on trust for sale, and to hold the proceeds of sale for the benefit of certain persons successively, which is a very common form of marriage settlement, it is usually provided that the sale shall be made at the request or with the consent of the tenants or tenant for life, and after the death of every tenant for life at the discretion of the trustees (*e*). In such cases there is no intention that the trustees should proceed to sell immediately (*f*); the trust is well

(*b*) *Truell* v. *Tysson*, 21 Beav. 437; Sug. Pow. 270, 271, 8th ed.; Farwell on Powers, 152, 2nd ed.

(*c*) Above, p. 268.

(*d*) See *Coxe* v. *Day*, 13 East, 118; *Re Head's Trustees and Macdonald*, 45 Ch. D. 310.

(*e*) 3 Davidson, Prec. Conv. 858, 3rd ed.; Williams on Settlements, 125; 2 Key & Elph. Prec. Conv. 506, 4th ed.

(*f*) See 1 Dart, V. & P. 64.

exercised if the sale be made during the lifetime of any tenant for life or within a reasonable time after the beneficiaries entitled to the capital of the purchase money have become entitled in possession (*g*). If, however, the lands remain unsold for a long time after the interests of all persons absolutely entitled to the proceeds of sale have vested in possession, the question arises whether they have not elected to take the property *in specie*, and so put an end to the trust for sale (*h*). If so, it would be necessary to obtain their concurrence upon a sale of the property. The same question of election by the beneficiaries to take the property may of course arise in the case of a trust for sale created by will (*h*). If a trust for sale be declared by a will merely for the purposes of a settlement of the purchase money made by the will, the same considerations apply with regard to the time of sale as in the case of a like settlement made by deed (*i*). Trusts declared by will for the sale of lands are, however, generally created for the purpose, amongst other objects, of raising money to pay the testator's debts or debts and legacies; and in all well-drawn wills a power for the trustees to postpone the sale is invariably inserted (*k*). Trusts created by will for sale of lands in order to pay the testator's debts appear to fall within the rule already mentioned (*l*) with regard to the time for exercising the power given by statute to sell real estate charged by will with debts (*m*)—namely, that if the sale be

Trusts declared by will for sale in order to pay testator's debts.

(*g*) *Biggs* v. *Peacock*, 22 Ch. D. 284; *Re Tweedie and Miles*, 27 Ch. D. 315; *Re Douglas and Powell's Contract*, 1902, 2 Ch. 296, 313.

(*h*) *Crabtree* v. *Bramble*, 3 Atk. 680; *Davies* v. *Ashford*, 15 Sim. 42; *Mutlow* v. *Bigg*, 1 Ch. D. 385; *Re Gordon*, 6 Ch. D. 531; *Re Davidson*, 11 Ch. D. 341; *Holder* v. *Lofts*, cited *Re Lewis*, 30 Ch. D. 654, 656; and see *Re Douglas and Powell's Contract*, 1902, 2 Ch. 296.

(*i*) See 1 Dart, V. & P. 64; and cases cited in nn. (*g*), (*h*), above.

(*k*) 4 Davidson, Prec. Conv. 6, 7, 49, 3rd ed.; 2 Key & Elph. Prec. Conv. 781, 782, 788, 4th ed.; Davidson's Concise Precedents, 536, 544, 17th ed.

(*l*) Above, p. 189, n. (*x*).

(*m*) Above, p. 189.

made within twenty years after the testator's death, the purchaser is not bound to inquire whether any of the testator's debts remain unpaid. After the expiration of that period, the purchaser should inquire whether any debts remain unpaid, if the only object of the trust for sale be to raise money to pay debts; but of course if the trusts of the purchase money be not only to pay debts, but to hold the surplus on trust for certain persons in succession, the question of the propriety of selling a long time after the testator's death depends on the same considerations as occur in other cases of settlements. Here it may be noted that the powers given to executors by the Land Transfer Act, 1897 (*n*), of selling their testator's real estate to satisfy his debts appear to be governed by the same rules as were previously applicable to sales by executors of their testator's leaseholds (*o*); so that, if real estate be sold by executors under such powers more than twenty years after the testator's death, the purchaser will be entitled to presume that the sale is rightly made, and need not inquire whether any of the testator's debts remain unpaid. In regard to the general question of the time for exercising trusts for sale, Lord St. Leonards observed that "people who deal with trustees raising money at a considerable distance of time, and without an apparent reason for so doing, must be considered as under some obligation to inquire and look fairly at what they are about" (*p*). But it appears that an out-and-out trust for sale of lands, if not determined by the beneficiaries' election, may be exercised after any lapse of time (*pp*).

Executors' power of sale under the Land Transfer Act, 1897.

Rule against perpetuities in connection with trusts for

A trust for or power of sale of lands to arise at a future time is invalid, unless so limited that it must necessarily become exercisable within the period allowed

(*n*) Stat. 60 & 61 Vict. c. 65, s. 2; above, pp. 190, 193.

(*o*) Above, pp. 178, 179, 189, n. (*x*).

(*p*) *Stroughill* v. *Anstey*, 1 De G. M. & G. 635, 654.

(*pp*) See above, p. 271, nn. (*g*), (*h*).

and powers of sale.

by the rule against perpetuities (*q*). But a trust for sale arising immediately, and at once effecting a conversion into personalty of the beneficial interest in the lands to be sold, is not obnoxious to the rule against perpetuities, although no limit of time be mentioned within which the trust must be exercised (*r*). And it is established that powers of sale immediately conferred on trustees over property comprised in settlements are not invalid for want of an express declaration that they must be exercised within the time given by the rule against perpetuities (*s*). Such powers are therefore exercisable within the period so allowed, though not, as a rule, after the settlement has come to an end by the vesting in possession of the estate in fee simple in remainder or reversion or other the absolute interest in the property settled (*t*). But such powers may remain exercisable after absolute interests have vested in possession, if such were the intention of the donor of the power, so long as the rule against perpetuities is not infringed. Thus, where the absolute interest in any settled property is ultimately limited to several persons as tenants in common, and a power of sale is given with the intention that it shall be exercised for the purpose of facilitating the division of the property after their interests have vested in possession, the power is exercisable within a reasonable time after such interests have so vested, provided that the limits allowed by the

(*q*) *Re Daveron*, 1893, 3 Ch. 421; *Goodier* v. *Edmunds*, ib. 455; *Re Appleby*, 1903, 1 Ch. 565.

(*r*) *Biggs* v. *Peacock*, 22 Ch. D. 284; *Re Tweedie and Miles*, 27 Ch. D. 315; *Re Douglas and Powell's Contract*, 1902, 2 Ch. 296, 313.

(*s*) *Biddle* v. *Perkins*, 4 Sim. 135; *Boyce* v. *Hanning*, 2 Cr. & J. 334; *Waring* v. *Coventry*, 1 My. & K. 249; *Wood* v. *White*, 4 My. & Cr. 460, 482; *Lantsbery* v. *Collier*, 2 K. & J. 709; *Peters* v. *Lewes, &c. Ry.*, 18 Ch. D. 429, 433, 434; Sug. Pow. 848—851, 8th ed.; 1 Jarm. Wills, 291, 4th ed., 261, 5th ed.; 1 Dart, V. & P. 68, 69; Farwell on Powers, 111, 2nd ed.

(*t*) *Wolley* v. *Jenkins*, 23 Beav. 53, 3 Jur. N. S. 324; *Taite* v. *Swinstead*, 26 Beav. 525; *Re Brown's Settlement*, L. R. 10 Eq. 349; Sug. Pow. 859—862, 8th ed.; 3 Davidson, Prec. Conv. 570—577, 3rd ed.; Farwell on Powers, 32, 33, 2nd ed.

rule against perpetuities be not exceeded (*u*). If property be given to trustees in trust for persons entitled, not successively, but for immediate absolute interests therein, it seems that a power of sale given to the trustees, and not limited as to the time of its exercise, would be void (*x*); but if some of the beneficiaries were infants, the power might perhaps be exercisable during their minority.

Order of the Court for administration of the trust.

Where trustees hold lands under a trust for or with power of sale, and an order of the Court has been made for the administration of the trust, they cannot properly exercise the trust or power without the direction of the Court (*y*).

Duties of trustees for sale.

The duties of trustees for sale, whether acting under a trust for or power of sale, are to sell the trust property to the best advantage: that is, in the manner most beneficial to all the *cestui-que-trusts*; to receive the purchase-money and dispose of it in due accordance with the trusts; to obtain proper advice as to the value of the trust property, and the best mode of sale (*z*), and generally to take all other precautions which a prudent man of business would take in conducting his own affairs (*a*). Under the Trustee Act, 1893 (*b*), where a trust for sale or a power of sale of property is vested in a trustee by any instrument coming into operation after the year 1881, and in the absence of any expression of a contrary intention, he may sell or concur with any other person in selling all or any part of the property,

(*u*) *Re Cotton's Trustees and the School Board for London*, 19 Ch. D. 624; *Re Sudeley and Baines & Co.*, 1894, 1 Ch. 334; *Re Jump*, 1903, 1 Ch. 129.

(*x*) *Taite* v. *Swinstead*, 26 Beav. 525, 529.

(*y*) Lewin on Trusts, 374, 391, 6th ed., 483, 515, 10th ed.; *Price* v. *Price*, 35 Ch. D. 297; see above, p. 185.

(*z*) Jessel, M. R., *Re Cooper and Allen's Contract*, 4 Ch. D. 802, 815.

(*a*) *Speight* v. *Gaunt*, 22 Ch. D. 727, 9 App. Cas. 1; see also *Falkner* v. *Equitable Reversionary Society*, 4 Drew. 352.

(*b*) Stat. 56 & 57 Vict. c. 53, s. 13, replacing 44 & 45 Vict. c. 41, s. 35.

either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss. These powers are similar to those which were generally inserted in instruments made before the year 1882 and creating trusts for or powers of sale (*c*); but neither the express nor the statutory powers appear to confer on trustees much greater authority or discretion than they possess independently of them under the rules of equity (*d*). And in exercising either the statutory or

(*c*) Like powers were given by Lord Cranworth's Act to trustees having an express power of sale over any hereditaments by virtue of an instrument executed on or after the 28th Aug. 1860; Stat. 23 & 24 Vict. c. 145, ss. 1, 2, 34; but these powers were not usually relied on in practice; Davidson, Prec. Conv. vol. iii. 557, 565, n. (*u*), 858, 1013—1018, 3rd ed.; vol. iv. 33, n. (*h*), 4th ed.

(*d*) Thus, in the absence of any restriction as to the mode of sale, trustees for sale might sell the trust property either all together or in lots, and either by public auction or private contract; Sug. V. & P. 60, 61; Lewin on Trusts, 383, 384, 6th ed., 497—501, 10th ed. They might make such special conditions of sale as might be reasonable and necessary in the state of their title; *Hobson* v. *Bell*, 2 Beav. 17; *Falkner* v. *Equitable Reversionary Society*, 4 Drew. 352; Lewin on Trusts, 384, 6th ed.; but they might not depreciate the trust property by unnecessary conditions of sale; *Dance* v. *Goldingham*, L. R. 8 Ch. 902. They might concur with other persons in selling the trust property together with other property, if such a mode of sale were clearly advantageous to the *cestui-que-trusts*, and the trustees took due precautions to ascertain that they would receive a proper proportion of the purchase money, and were careful to receive the money themselves; but otherwise not; *Rede* v. *Oakes*, 4 De G. J. & S. 505; *Re Cooper and Allen's Contract*, 4 Ch. D. 802, 814—821. They might consequently join with the owners of prior charges in selling the whole property free from incumbrances, or they might sell the particular interest only, which had been vested in them on trust for sale, whichever course would be likely to be most advantageous to their *cestui-que-trusts*; see 4 Ch. D. 817. Trustees were justified in fixing a reserved price on a sale by auction, and they might buy in at that price; *Re Peyton's Settlement*, 30 Beav. 252; Sug. V. & P. 62; but if, after buying in, they made undue delay in effecting a sale, they were answerable for any loss occasioned thereby; *Taylor* v. *Tubrum*, 6 Sim. 281. It appears also that trustees might vary or rescind any contract for sale, if such a course clearly appeared to be for the advantage of their *cestui-que-trusts*; *Falkner* v. *Equitable Rever-*

similar express powers, trustees are bound to apply the same principles which should regulate their action in the absence of express authority. In both cases Courts of Equity exact a strict adherence to the duties of trustees for sale (*e*). Thus it was held that trustees, expressly empowered to make such special conditions of sale as they might think fit, were no more at liberty to make depreciatory conditions of sale, unless strictly necessary in the state of their title, than were trustees who had no such express authority. And if depreciatory conditions were unnecessarily made on a sale by trustees, the Court would restrain the sale at the instance of any *cestui-que-trust* (*f*), or the purchaser might resist the specific performance of the contract (*g*). In this particular instance, however, the legislature has interposed; and with regard to sales made after the 24th of December, 1888, it is now enacted as follows (*h*) :—

(1.) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2.) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

(3.) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

Trustees are, moreover, expressly empowered to sell subject to any of the stipulations implied in contracts

sionary Society, 4 Drew. 352; Lewin on Trusts, 384, 6th ed., 500, 10th ed.

(*e*) *Dance* v. *Goldingham*, L. R. 8 Ch. 902, 907, n., 909, 910; *Dunn* v. *Flood*, 25 Ch. D. 629, 634, 28 Ch. D. 586, 591, 592.

(*f*) *Dance* v. *Goldingham*, L. R. 8 Ch. 902.

(*g*) *Rede* v. *Oakes*, 4 De G. J. & S. 505; *Dunn* v. *Flood*, 25 Ch. D. 629, 28 Ch. D. 586.

(*h*) Stat. 56 & 57 Vict. c. 53, s. 14, replacing 51 & 52 Vict. c. 59, s. 3.

by virtue of the Vendor and Purchaser Act, 1874 (*i*), or the Conveyancing Act, 1881 (*k*). Subject to these enactments, however, trustees for sale must still exercise the discretions conferred upon them by the above-mentioned statutory powers (*l*) in a reasonable manner, and with an eye to obtaining the best advantage they can for their *cestui-que-trusts* (*m*).

Trustees for sale must sell for money.

It is important to note, with regard to the exercise of a trust for or power of sale, that the term "sale" is, as a rule, taken in the strict sense of conveyance in consideration of a price paid in money (*n*). Trustees acting under a trust for or power of sale are not, therefore, at liberty to accept any other consideration for their conveyance than the payment of money. They must not, for example, sell in consideration of receiving stock, shares, bonds, debentures or similar securities (*n*), or in consideration of the grant of a rentcharge (*o*), unless the terms of the trust or power specially authorise them to convey for such considerations (*p*). So, also, a conveyance by way of exchange or partition is not a valid execution of a trust for or power of sale (*q*). But trustees for sale, who are authorized to invest the

(*i*) Stat. 56 & 57 Vict. c. 53, s. 15, replacing 37 & 38 Vict. c. 78, s. 3.

(*k*) Stat. 44 & 45 Vict. c. 41, s. 66.

(*l*) Above, p. 274.

(*m*) Above, p. 275, n. (*d*).

(*n*) Above, p. 1; Stirling, J., *Payne* v. *Cork Co., Ltd.*, 1900, 1 Ch. 308, 314. *

(*o*) *Read* v. *Shaw*, Sug. Pow. 953, 8th ed.; *ibid.* 864: Farwell on Powers, 559, 2nd ed. *

(*p*) See *Re Morgan*, 24 Ch. D. 114, 115. In *Re Jackson*, 44 Sol. J. 573, it was held that trustees empowered to sell a testator's real estate, "upon such terms and conditions and generally in such manner as they could do if absolute owners thereof," were at liberty to sell either wholly or partly in consideration of a fee farm rent.

(*q*) *M'Queen* v. *Farquhar*, 11 Ves. 467; Sug. Pow. 857, 858, 8th ed. But where there is a power of sale and investment of the proceeds in the purchase of other hereditaments, it appears that an exchange or a partition may be effected circuitously by sale and investment of the purchase money in the lands desired to be taken in exchange or held in severalty; Sug. Pow. 858, 8th ed. As to effecting a partition under a power of sale *and exchange*, see *Re Frith and Osborne*, 3 Ch. D. 618.

* see also Re Ware, 1892, 1 ch. 344, 347; Re Ash. 1899, W.N. 233.

purchase money on real securities, may well agree to leave a proper proportion of the purchase money on mortgage of the lands sold (*r*). A trust for or power of sale created for the purpose of effecting an out-and-out conversion of lands into money does not authorize a mortgage of the lands (*s*). But if the intention of the author of the trust or power were simply to facilitate the raising of a sum of money charged on the lands, and not to disturb the ownership of the lands further than should be necessary in order to satisfy the charge, a mortgage made under the trust or power may be supported as a conditional sale (*t*). A trust or power to mortgage lands does not authorize a sale of them (*u*). Upon this ground it has been held that a power to mortgage lands does not authorize a mortgage of them with power of sale (*x*); but in later cases this rule has been abandoned in favour of the doctrine that a power of sale is an usual and a necessary incident of a mortgage, and may therefore properly be inserted in a mortgage made under a trust or power to mortgage (*y*). A trust for sale of lands does not authorize a lease of them, so that a trustee for sale of leaseholds is not justified in disposing of them by way of underlease at an improved rent (*z*). And it has been held that a

Whether a trust for or power of sale authorizes a mortgage.

Whether a trust or power to mortgage authorizes a sale, or a mortgage with power of sale.

(*r*) Observe the terms of the contract for sale under the Settled Land Acts sanctioned by the House of Lords in *Bruce* v. *Ailesbury*, 1892, A. C. 356, 357; and see *Thurlow* v. *Mackeson*, L. R. 4 Q. B. 97; *Bettyes* v. *Maynard*, 31 W. R. 461; *Re Hotham*, 1902, 2 Ch. 575.

(*s*) *Haldenby* v. *Spofforth*, 1 Beav. 390; *Stroughill* v. *Anstey*, 1 De G. M. & G. 635; *Page* v. *Cooper*, 16 Beav. 396; *Devaynes* v. *Robinson*, 24 Beav. 86.

(*t*) See *Stroughill* v. *Anstey*, 1 De G. M. & G. 465; *Page* v. *Cooper*, 16 Beav. 400; Sug. Pow. 425, 8th ed.; Lewin on Trusts, 377, 6th ed., 487, 10th ed.

(*u*) *Drake* v. *Whitmore*, 5 De G. & S. 619; *Cook* v. *Dawson*, 29 Beav. 123.

(*x*) *Clarke* v. *Royal Panopticon*, 4 Drew. 26.

(*y*) *Bridges* v. *Longman*, 24 Beav. 27, 29; *Cook* v. *Dawson*, 29 Beav. 123, 128; *Re Chawner's Will*, L. R. 8 Eq. 569; Farwell on Powers, 447—450, 2nd ed.

(*z*) *Evans* v. *Jackson*, 8 Sim. 217. An executor or administrator, however, where the assets include leaseholds, may grant an underlease if such a mode of disposition be beneficial to the estate, but not otherwise, and the title of the underlessee is dependent on the underlease being

trust for sale of leaseholds vested in trustees, who are assignees of the lease, is not well executed by granting an underlease at the same rent as that reserved by the original lease in consideration of the payment of a lump sum as purchase money. This was so decided on the ground that it is the duty of the trustees to get rid of the property out and out, and to divest themselves accordingly of all liability for the rent and covenants of the lease, for which, of course, they would remain liable on a sale by way of underlease (*a*).

Timber and minerals.

Trustees for sale of land, unless expressly authorized by the instrument creating the trust, are not entitled to sell the land apart from the timber growing thereon (*b*), or to sell the surface reserving the mines and minerals thereunder (*c*). But under the Trustee Act, 1893 (*d*), replacing an Act of 1862 (*e*), the High Court may sanction the sale by a trustee, or other person authorized

beneficial; Wms. Exors. 939, 940, 7th ed.; *Keating* v. *Keating*, Ll. & G. *t.* Sug. 133; *Hackett* v. *M'Namara*, Ll. & G. *t.* Plunk. 283; *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236, 243.

(*a*) *Re Walker and Oakshott's Contract*, 1901, 2 Ch. 383, in which case Kekewich, J., considered that in other respects the transaction was a sale, though carried out by way of underlease; and see *Re Webb*, 1897, 1 Ch. 144, 148, where a sale of leaseholds by trustees (though not, apparently, trustees for sale) made under an order of the Court was carried out by way of underlease with the approval of Stirling, J.: but in that case no objection seems to have been taken by the purchaser. When land held under one lease is sold in lots, it is usual to stipulate that the purchaser of the largest lot in value shall take an assignment of the lease and shall grant underleases to the other purchasers at apportioned rents of the lots bought by them; and this course is available on a sale by trustees for sale; see 1 Dart, V. & P. 148, 195, 196; 1 Davidson, Prec. Conv. 545, 700, 701, 4th ed., 453, 563, 5th ed.; 1 Key & Elph. Prec. Conv. 269, 6th ed.; Davidson's Concise Precedents, 116, 17th ed.; 1901, 2 Ch. 385.

(*b*) *Cholmely* v. *Paxton*, 3 Bing. 207, 5 Bing. 48; *S. C.* nom. *Cockerell* v. *Cholmeley*, 10 B. & C. 564, 3 Russ. 565, 1 R. & M. 418, 1 Cl. & Fin. 60.

(*c*) *Buckley* v. *Howell*, 29 Beav. 546. See 3 Davidson, Prec. Conv. 295, 3rd ed.; Dart, V. & P. 76, 1296.

(*d*) Stat. 56 & 57 Vict. c. 53, s. 44, amended by 57 Vict. c. 10, s. 4, and extending to dispositions by way of exchange, partition or enfranchisement by a trustee or other person authorized so to dispose of land.

(*e*) Stat. 25 & 26 Vict. c. 108.

to sell land, of the land with an exception or reservation of any minerals, or of the minerals separately from the rest of the land, and in each case either with or without rights and powers of and incidental to the working, getting or carrying away of the minerals. And when such sanction has been once obtained, the trustee or other person may make such sales from time to time without any further application to the Court, unless forbidden by the instrument creating the trust or authority to sell (*f*). Trustees for sale of land should not, it appears, agree to sell at a price to be fixed by valuation; for that would be a delegation of their discretion to decide what price they will accept (*g*). On these grounds it appears that they ought not to enter into a contract for sale containing the usual stipulations (*h*) as to taking timber at a valuation; but they should sell the whole property together at one price (*i*). The same reasoning is applicable in the case of fixtures. But a stipulation on a sale by trustees that the purchaser shall pay a fixed sum for the timber or fixtures in addition to the price of the land does not appear to be objectionable; as that is, in effect, a sale of the whole property at one price settled by the trustees themselves (*k*). A trustee for sale is not entitled to enter into an agreement giving some person an option to purchase the property at a future time (*l*).

Trustees should not sell at a valuation.

Option of purchase.

(*f*) Stat. 56 & 57 Vict. c. 53, s. 44 (2), amended by 57 Vict. c. 10, s. 4.

(*g*) 1 Dart, V. & P. 90.

(*h*) Above, pp. 50, 59.

(*i*) 1 Davidson, Prec. Conv. 522, 4th ed., 434, 5th ed. In *Re Llewellin*, 37 Ch. D. 317, a tenant for life without impeachment of waste selling under the Settled Land Acts sold the settled land by auction with a stipulation that the purchaser should pay for the timber at a valuation to be made in the usual way. The vendor claimed to have the amount of this valuation paid to him. It was decided that he was not entitled to this. But no suggestion was made that the sale was invalid as an exercise of the statutory power on the ground that the price of the timber was to be ascertained by valuation. The remainderman was probably content with the result of the sale.

(*k*) See *Cockerell* v. *Cholmeley*, 10 B. & C. 564, 571.

(*l*) *Clay* v. *Rufford*, 5 De G. &

It must not be forgotten, in considering a title depending on the exercise by trustees of a trust for or power of sale, that the capacity to exercise the trust or power is not necessarily co-incident with the devolution of the legal estate. It is not every person succeeding to an estate given in trust who is competent to execute a discretionary trust or power connected therewith; on the contrary, the general rule is that such a trust or power can only be well executed by the persons whom the author of the trust has designated for the purpose, and in whom he has placed his confidence accordingly (*m*). Thus in every case in which such a trust or power is exercised by any other persons than those originally entrusted therewith, the question arises whether the persons who purport to act in exercise of the trust or power are expressly or impliedly authorised to execute the same. On this point the law is as follows:—

What persons, besides the original trustees, can exercise a trust for or power of sale.

First, with respect to discretionary trusts or powers coupled with an estate or interest, as where lands are vested in trustees in fee upon trust for or with power of sale. If several trustees be invested with such a trust or power, the same may be exercised by the survivors or survivor of them for the time being, unless a contrary intention should have been expressed in the instrument creating the trust (*n*). And if one or more

As to trusts or powers coupled with an interest.

Survivorship of the trust.

Disclaimer.

Sm. 768, 779, 780; *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236.

(*m*) *Crewe* v. *Dicken*, 4 Ves. 97; *Cole* v. *Wade*, 16 Ves. 27, 46, 47; and see the cases cited below, pp. 283, 284, and *Re Rumney and Smith*, 1897, 2 Ch. 351, 356, 359, 360.

(*n*) So enacted as to trusts constituted after or created by instruments coming into operation after the 31st Dec. 1881; stat. 56 & 57 Vict. c. 53, s. 22, replacing 44 & 45 Vict. c. 41, s. 38. But with respect to trusts or powers coupled with an interest, these enactments did no more than declare the previous law; Co. Litt. 113a; *Warburton* v. *Sandys*, 14 Sim. 622; *Watson* v. *Pearson*, 2 Ex. 581, 594; *Lane* v. *Debenham*, 11 Hare, 188; Lewin on Trusts, 230, 509, 510, 6th ed., 282, 726, 10th ed; Re Smith 1904, 1 Ch 139.

New trustees.

of the trustees should disclaim, the trust or power may be exercised by the other trustees or trustee (*o*). Every new trustee duly appointed under the statutory power to appoint trustees—whether conferred by Lord Cranworth's Act (*p*), the Conveyancing Act of 1881 (*q*), or the Trustee Act, 1893 (*r*)—has the same powers, authorities and discretions, and may in all respects act as if he had been originally appointed a trustee, and so can well exercise such a trust or power, after the estate has been properly vested in him. Any new trustee duly appointed under an express power has equal authority in this respect (*s*). And the same authority is now conferred by statute upon every trustee appointed by a Court of competent jurisdiction (*t*). With respect to the exercise of such a trust or power as we are considering after the death of a sole or the last surviving trustee, the true principle appears to be that the same

Trustees appointed by the Court.

Persons succeeding to the estate on the death of a sole or last surviving trustee.

(*o*) Co. Litt. 113a; Jenk. Cent. 44; *Crewe* v. *Dicken*, 4 Ves. 97, 100; *Granville* v. *McNeile*, 7 Hare, 156. It is now settled that disclaimer of the estate, as well as of the office, of a trustee may be made by conduct only and need not be evidenced by matter of record or by deed; *Re Birchall*, 40 Ch. D. 436; Lewin on Trusts, 176, 177, 6th ed., 211, 212, 10th ed. It must not be forgotten that, where one is appointed executor and trustee of a will, refusal to act as executor, and even renunciation of probate, is not in itself a disclaimer of the trusteeship or of any estate in or power over land devised or given to the trustees of the will; but it may be evidence of such disclaimer; Lewin on Trusts, 215, 10th ed.; *Re Gordon*, 6 Ch. D. 531, 534. *

(*p*) Stat. 23 & 24 Vict. c. 145, s. 27.

(*q*) Stat. 44 & 45 Vict. c. 41, s. 31 (5).

(*r*) Stat. 56 & 57 Vict. c. 53, s. 10 (3).

(*s*) Such authority was expressly conferred in the old common form of power to appoint new trustees: but if not expressly conferred, it would be implied from the very fact that the creator of the trust expressly authorised the appointment of new trustees; Lewin on Trusts, 507, 6th ed., 722, 10th ed.

(*t*) Stat. 56 & 57 Vict. c. 53, s. 37, replacing 44 & 45 Vict. c. 41, s. 33, and 23 & 24 Vict. c. 145, s. 27. Before the enactment last cited, new trustees appointed by the Court and not by virtue of an express power to appoint new trustees could not, as a general rule, exercise arbitrary or special discretionary powers conferred upon the original trustees, unless such powers should have been expressly or impliedly extended to the trustees for the time being; *Fordyce* v. *Bridges*, 2 Ph. 497, 510; *Newman* v. *Warner*, 1 Sim. N. S. 457; *Bartley* v. *Bartley*, 3 Drew. 384; *Byam* v. *Byam*, 19 Beav. 58.

* As to the effect of a disclaimer by all the trustees or the only trustee, see Mallott v Wilson, 1903, 2 Ch 494.

is exercisable by the persons who succeed to the legal estate after his death, if the author of the trust has either expressly or impliedly authorised such persons to execute the same; but otherwise not (*u*). Thus, where lands have been vested in A. and B. in fee in trust that they, A. and B. (naming them, but not mentioning their heirs or other legal representatives), shall sell the same, it does not appear that under the old law of the descent of trust estates (*x*) the heir (*y*), or according to the present law (*z*) the executors or administrators of the surviving trustee, could well execute the trust (*a*). According to the old conveyancing practice in force before the commencement of the Conveyancing Act of 1881 (*b*), it was usual, where real estate was vested in trustees in fee on trust for or with power of sale, to provide expressly that the trust or power should be exercisable by the trustees originally appointed or the survivors or survivor of them, or the heirs of such survivor (*c*); and in such cases there was no doubt that the heir of the last surviving trustee could well execute the trust or power if he took the legal estate (*d*). But where lands were vested in trustees in fee on trust that they or the survivors or survivor of them or the heirs of such survivor should sell the same, and the surviving trustee devised the trust estate, it was held that the devisee, not being authorised by the creator of the trust to execute the trust for sale, could not make a

Heir of sole or surviving trustee.

Devisee.

(*u*) Above, p. 281, and n. (*m*).

(*x*) Above, p. 180.

(*y*) *Mortimer* v. *Ireland*, 11 Jur. 721; Lewin on Trusts, 202, 6th ed., 245, 10th ed.

(*z*) Above, p. 182.

(*a*) *Re Ingleby and Boak, &c.*, 13 L. R. Ir. 326. But distinguish the cases mentioned in note (*d*), below.

(*b*) Stat. 44 & 45 Vict. c. 41, which came into operation after the 31st Dec. 1881; s. 1 (2).

(*c*) Davidson, Prec. Conv. vol. i. p. 333, 4th ed.; vol. iii. pp. 858, 1271, 3rd ed.; vol. iv. p. 32 and note, 3rd. ed.

(*d*) See Lewin on Trusts, 202, 6th ed. So the heir of the last surviving trustee could sell under a limitation to trustees and their heirs on trust "for sale" or "to sell" or that the trustee for the time being should sell; *Re Morton and Hallett*, 15 Ch. D. 143, 145, 149; *Re Cunningham and Frayling*, 1891, 2 Ch. 567.

good title on a sale of the lands (*e*). And in such a case, it may be noted, the heir could not execute the trust, for he had no estate in the land (*f*). Where lands were vested in trustees in fee in trust that they or the survivors or survivor of them or the heirs or *assigns* of such survivor should sell the same, it was held that the devisee of the last surviving trustee, being one of the persons expressly designated by the author of the trust, could well execute the trust for sale (*g*). It was held by Jessel, M. R., that where lands were devised to trustees and their heirs on trust for sale, it must be taken that the testator intended to annex the trust to the estate, and that the devisee of the surviving trustee could execute the trust for sale accordingly; and he considered that the preceding decision to the contrary (*h*) had been overruled (*i*). Subsequently, however, Baggallay and James, L. JJ., stated that they were not prepared to concur in this view (*k*), and Stirling, J., declared that he would hesitate to force upon a purchaser a title depending on the case of *Cooke* v. *Crawford* not being good law (*l*). It appears, therefore, that the decision of Jessel, M. R., in *Re Osborne to Rowlett* (*m*), in so far as it conflicts with the principle above stated (*n*), can no longer be regarded as good law. As we have seen (*o*), since the Conveyancing Act of 1881 (*p*) took effect, real estate of inheritance vested in a sole trustee devolves, notwithstanding any testamentary disposition, upon his legal personal repre-

Personal representatives of sole or surviving trustee.

(*e*) *Cooke* v. *Crawford*, 13 Sim. 91; *Wilson* v. *Bennett*, 5 De G. & S. 475; *Stevens* v. *Austen*, 3 E. & E. 685.

(*f*) Lewin on Trusts, 202, 6th ed.; 245, 246, 10th ed.

(*g*) *Titley* v. *Wolstenholme*, 7 Beav. 425; *Hall* v. *May*, 3 K. & J. 585.

(*h*) *Cooke* v. *Crawford*, 13 Sim. 91.

(*i*) *Osborne to Rowlett*, 13 Ch. D. 774.

(*k*) *Re Morton and Hallett*, 15 Ch. D. 143, 149, 150; and see *Re Ingleby and Boak*, 13 L. R. Ir. 326.

(*l*) *Re Rumney and Smith*, 1897, 2 Ch. 351, 357.

(*m*) 13 Ch. D. 774.

(*n*) Pp. 282, 283.

(*o*) Above, p. 182.

(*p*) Stat. 44 & 45 Vict. c. 41, s. 30.

sentatives in like manner as if the same were a chattel real vested in them, and they are to be deemed in law his heirs and assigns within the meaning of all trusts and powers. It appears, therefore, that the legal personal representatives of a sole or sole surviving trustee may now exercise such trusts or powers as we are discussing in all cases in which under the old law the estate would have descended to the heir, and the heir so taking the legal estate could have well executed the trust or power (*q*). Where lands have been devised to trustees in fee upon trust for sale, and the devise of the legal estate has failed by reason of the trustees' death in the testator's lifetime, or of their disclaimer, then, if the testator died before the commencement of the Land Transfer Act, 1897, his heir, and otherwise his personal representatives, would take the legal estate subject to the trusts declared by the will (*r*), but could not well execute the trust for sale (*s*); although in the latter case the personal representatives could, of course, exercise the power of sale given to them by the last-mentioned Act (*t*). It should be noted that a difficulty may arise as to the persons who are authorised to exercise a trust for or power of sale, where lands vested in a sole trustee in fee upon such a trust or with such a power have been devised by him (under the present law) to other persons than his executors. The Conveyancing Act of 1881 (*u*) does not expressly take away the power of devising real estate held in trust: it merely provides that, notwithstanding any testamentary disposition, the same shall vest on the trustee's death in his legal personal representatives *in like manner as if the same were a chattel real vesting in them.* Now, when

Failure of devise of legal estate to trustee.

Question in case of a devise by a sole trustee under the present law.

(*q*) Above, p. 283, and note (*d*).

(*r*) *Pitt* v. *Pelham*, Freem. Ch. 134; *Sonley* v. *Clockmakers' Co.*, 1 Bro. C. C. 81.

(*s*) *Robson* v. *Flight*, 4 De G. J. & S. 608, 613; Farwell on Powers, 460, 2nd ed.

(*t*) Above, p. 193.

(*u*) Stat. 44 & 45 Vict. c. 41, s. 30.

a man dies possessed of a chattel real, it vests at first in his legal personal representatives by virtue of their office, notwithstanding that he may have bequeathed it specifically; but on their assent to the bequest the legal estate therein passes at once to the specific legatee without any further conveyance (*x*). And if a man be possessed of a chattel real upon trust, he may nevertheless devise his estate therein to other persons than his executors (*y*). And should he do so, it does not appear that his executors could disregard the specific devise and execute the trusts themselves, although the chattel has vested in them in the first instance by virtue of their office, and they would, but for the specific devise, be the proper persons to execute the trust. Thus, where leaseholds had been conveyed to two trustees, *their executors or administrators* (without further words), upon certain trusts, and the survivor of the two trustees devised all estates vested in him on any trust to A. and B. upon the same trusts on which he held the same, and appointed A., B. and C. his executors, it was held that neither the devisees of the trust estate nor the executors could exercise the trusts; and that since by the bequest the testator had taken the legal estate from those persons who ought otherwise to have been the trustees, the appointment of new trustees was necessary (*z*). It seems, therefore, that where real estate of inheritance vested in a sole trustee for sale or with power of sale has been devised by him to other persons than his executors, then, if under the old law the trust or powers could not have been well executed by his devisee, a purchaser could not safely accept the title under a purported exercise of the trust or power either by the executors alone or by the executors and devisees together. And if the terms of the trust should have authorised the assigns of the

(*x*) Above, p. 179.

(*y*) See stat. 7 Will. 4 & 1 Vict. c. 26, s. 3; Lewin on Trusts, 198, 6th ed.

(*z*) *Re Burtt*, 1 Drew. 319.

trustees to exercise the trust or power, still a purchaser could scarcely be advised to accept a title under a purported exercise of the trust or power by the devisees in conjunction with the executors; for as the latter are to be deemed in law the deceased trustee's heirs *and assigns* within the meaning of all trusts and powers, it would be doubtful to what persons the purchase money should be paid. In either case, therefore, the only safe course would seem to be to require the appointment of new trustees.

Power without an interest.

In the case of a power of sale given to trustees without any estate in the land, such as the power of sale usually inserted in settlements of land before the Settled Land Act, 1882, took effect, the rule is even more strict that the same can only be well exercised by the persons designated for this purpose by the donor of the power (*a*). It is now provided (*b*), with respect to executorships and trusts constituted after or created by instruments coming into operation after the year 1881, that a power given to two or more executors or trustees jointly may be exercised by the survivors or survivor of them for the time being, unless the contrary were expressed in the instrument creating the power. Independently of this enactment, the law respecting the survivorship of bare powers appears to be as follows:—

Survivorship of powers given to trustees.

Survivorship of bare powers.

General rule.

I. The general rule is that, when a bare power is given to two or more persons, after the death of any one of them, it cannot be exercised by the survivor or survivors (*c*).

Powers given to executors.

II. When a bare power was given to two or more executors, words might be used, which showed an

(*a*) *Townsend* v. *Wilson*, 1 B. & A. 608.

(*b*) Stat. 56 & 57 Vict. c. 53, s. 22, apparently extended to executors by s. 50, and replacing 44 & 45 Vict. c. 41, s. 38.

(*c*) Co. Litt. 112b, 113a; Sug. Pow. 126, 128; *Montefiore* v. *Brown*, 7 H. L. C. 241.

intention that the power should be annexed to the office of executor; and, in such a case, after the death of any one of them, the survivor or survivors were capable of exercising the power (*d*). When, therefore, a man by will gave a power to his executors, designating them as such without naming them (*e*), or designating them "his executors hereinafter named" (*f*), it was held that the power was annexed to the office of executor and might be exercised even by a sole surviving executor. Supposing that a man gave by will a mere power to two or more persons, designating them by their names, without any reference to the office of executor, and in a subsequent part of the will appointed the same persons executors: it would be an exceedingly nice question, to be determined by a consideration of the purposes for which the power was given, whether an intention were shown to annex the power to the office of executor, sufficient to take the case out of the general rule (*g*).

Powers arising by implication of law.

III. Powers of executors, which arose by implication of law, were annexed to the office, and might be exercised, after the death of any executor, by the surviving executors for the time being or by a sole surviving executor (*h*).

Powers given to trustees.

IV. If a bare power were given to two or more trustees, and the words used in the instrument creating the trust showed that the power was intended to be annexed to the office of trustee and not to be conferred upon the donees as individuals, it appears that, after

(*d*) *Brassey* v. *Chalmers*, 16 Beav. 233; 4 De G. M. & G. 528; Sug. Pow. 128; *Crawford* v. *Forshaw*, 1891, 2 Ch. 261.

(*e*) Jenk. Cent. 43, case 83.

(*f*) *Brassey* v. *Chalmers*, 4 De G. M. & G. 528, following *Houell* v. *Barnes*, Cro. Car. 382; *Crawford* v. *Forshaw*, 1891, 2 Ch. 261; *contra*, *Lock* v. *Loggin*, 1 And. 145.

(*g*) See Sug. Pow. 127, 128; Jenk. Cent. 43, case 83; Hargrave's note (2) to Co. Litt. 113a; *Crawford* v. *Forshaw*, 1891, 2 Ch. 261, 266—269.

(*h*) Dyer, 371b, case 3; *Forbes* v. *Peacock*, 11 M. & W. 630, 639; Sug. Pow. 128.

the death of one, the survivor or survivors could execute the power (*i*). But if no such intention appeared, the case fell within the general rule (*k*).

Powers given to a class.

V. It is said that, if a power be given to three or more persons, by a class designation and not by their names, for instance, "to my trustees," "to my sons," after the death of any of them, the authority will survive so long as the plural number remains (*l*). This is a doubtful proposition (*m*). It is submitted that if a man gave a power to his "trustees" without designating them by name, the case would have fallen within the preceding proposition.

Release and disclaimer of powers.

Under the Conveyancing Act of 1881 (*n*), a person to whom any power, whether coupled with an interest or not, is given may by deed release or contract not to exercise the power. And under the Conveyancing Act, 1882 (*o*), any power, whether coupled with an interest or not, may be disclaimed by deed, after which the disclaiming party shall not be capable of exercising or joining in the exercise of the power; but the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power was given, unless the contrary were expressed in the instrument creating the power. With respect to powers coupled with an interest, these enactments did

(*i*) Romilly, M. R., *Byam* v. *Byam*, 19 Beav. 58. The decision in this case was that a power given to "the undersigned trustees" could, under the old law, be exercised by trustees appointed by the Court; see above, p. 282, n. (*t*).

(*k*) *Townsend* v. *Wilson*, 1 B. & A. 608; see *Hall* v. *Dewes*, Jac. 189.

(*l*) Sug. Pow. 128; *Lee* v. *Vincent*, Cro. Eliz. 26; Co. Litt. 113a.

(*m*) See *Sykes* v. *Sheard*, C. A., 2 De G. J. & S. 6, disapproved by Malins, V.-C., *Jefferys* v. *Marshall*, 19 W. R. 95; Farwell on Powers, 456, 2nd ed.

(*n*) Stat. 44 & 45 Vict. c. 41, s. 52 (1), applying (by sub-s. 2) to powers created either before or after the commencement of the Act.

(*o*) Stat. 45 & 46 Vict. c. 39, s. 6 (1, 2), applying (by sub-s. 3) to powers created either before or after the commencement of the Act.

no more than declare the previous law (*p*). But a power simply collateral could not formerly be extinguished or suspended by release or any other means (*q*). And it appears that the disclaimer of a bare power was formerly ineffectual (*r*). And where a bare power had been given to two or more persons and one of them had affected to disclaim the power, the power could not, as a rule, be well exercised by the other or others of them (*s*). But in the case of a power given by will to the testator's executors to sell his lands, if any of the executors refused to take administration of the will, the accepting executors or executor might by statute (*t*) exercise the power alone. And where a power was annexed to the office of executor, either by implication of law or by the testator's direction (*u*), an executor who renounced probate could not exercise the power (*x*); but the executors or executor who proved might well do so (*y*). If trustees were invested with any power which it would be their duty to exercise, they could not release or contract not to exercise the same or otherwise divest

Release of power, where a breach of trust.

(*p*) The donee of any power other than a power simply collateral might always release or contract not to exercise it; Sug. Pow. 82 *sq.*; *West* v. *Berney*, 1 R. & M. 431; *Smith* v. *Death*, 5 Madd. 371; *Horner* v. *Swann*, T. & R. 430; *Hurst* v. *Hurst*, 16 Beav. 372; *Isaac* v. *Hughes*, L. R. 9 Eq. 191. And if a power coupled with an estate or interest were given to any person, he might disclaim the estate and thus render himself incapable of exercising the power; Sug. Pow. 50; *Hawkins* v. *Kemp*, 3 East, 410, 437; *Nicloson* v. *Wordsworth*, 2 Sw. 365, 369, 370; *Adams* v. *Taunton*, 5 Madd. 435.

(*q*) Sug. Pow. 49, 893; *West* v. *Berney*, 1 R. & M. 431, 434. A power simply collateral is a power by the exercise of which the donee can acquire no interest in the subject-matter of the power, given to a person who has not any interest therein at the time of the creation of the power and takes no interest therein under the instrument conferring the power; see Sug. Pow. 47, 48.

(*r*) Sug. Pow. 50.

(*s*) Sug. Pow. 50, 126; see above, pp. 287—289.

(*t*) Stat. 21 Hen. VIII. c. 4.

(*u*) Above, p. 288.

(*x*) *Keates* v. *Burton*, 14 Ves. 434; *A.-G.* v. *Fletcher*, 5 L. J. (N. S.) Ch. 75; see Farwell on Powers, 95—98, 2nd ed.

(*y*) *Crawford* v. *Forshaw*, 1891, 2 Ch. 261, 266, 267.

themselves of their authority (*z*); and the above enactments have not altered the law in this respect (*a*).

Exercise of a bare power by new trustees.

The law as to the exercise by any new trustee duly appointed of a bare power given to any trustee or trustees is the same as governs the exercise by a new trustee of a power coupled with an interest (*b*). With respect to the exercise by any other person than a new trustee duly appointed of a bare power given to a trustee or trustees after the death of a sole or the last surviving trustee, there is, of course, no succession to any estate in the land, and the power can only be exercised, if at all, by some person expressly designated for the purpose by the donor of the power, as where the executors or administrators of the last surviving trustee are mentioned among the persons to whom the power is given (*c*).

By any others after the death of the original donees.

Trustees exercising a power conferred by a settlement for some purpose provided for in the Settled Land Acts.

In the case of a purchase from trustees exercising a power of sale, the conveyancer advising the purchaser must have regard to the provisions of the Settled Land Act, 1882 (*d*), which make the consent of the tenant for life under a settlement necessary to the exercise by the trustees of the settlement or any other person of any power conferred by the settlement and exercisable for any purpose provided for in the Act. He must consider,

(*z*) *Weller* v. *Ker*, L. R. 1 Sc. App. 11; *Re Dunne's Trusts*, 1 L. R. Ir. 516; *Saul* v. *Pattinson*, 34 W. R. 561.

(*a*) *Re Eyre*, 49 L. T. N. S. 259.

(*b*) Above, p. 282; see *Hall* v. *Dewes*, Jac. 189.

(*c*) See above, pp. 287—289; Farwell on Powers, 453, 454, 2nd ed.

(*d*) Stat. 45 & 46 Vict. c. 38, s. 56, sub-s. 2, enacting that in case of a conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts *or intends* to exercise any power under this Act, the provisions of this Act shall prevail; and accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act.

therefore, whether the instrument conferring the power is, either alone or together with other instruments, a settlement within the meaning of the Act (*e*). And if it be, he should require the limitations of the beneficial interests under the settlement to be abstracted (if this has not been done) sufficiently to show whether there is a tenant for life, or a person having the powers of a tenant for life, entitled in possession under the settlement (*f*). And if the existence of any such person be disclosed, the conveyancer should require him to consent to the exercise of the power; for if such consent should not be obtained, any conveyance to him by the trustees in supposed pursuance of the authority conferred by the settlement would be void as an exercise of the power (*g*).

It will be observed that the only powers, to the exercise of which the consent of the tenant for life is so required, are those conferred by the settlement and exercisable for any purpose provided for in the Act. It must not be forgotten that in this context the expression "the settlement" means the settlement as defined in the Act, and therefore extends to any group of instruments forming what is termed a compound settlement (*h*). The purposes provided for in the Act are, of course, principally the sale of settled land and the application of the purchase money in manner therein provided, the exchange and partition of settled land and the leasing thereof for the terms specified in the Act (*i*); and any express powers conferred by the settlement for any of these purposes, upon any person or persons other than

(*e*) See stats. 45 & 46 Vict. c. 38, s. 2; 53 & 54 Vict. c. 69, s. 4; *Re Ailesbury and Iveagh*, 1893, 2 Ch. 345; *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275; and see next chapter.

(*f*) See stat. 45 & 46 Vict. c. 38, ss. 2 (5), (7), 58.

(*g*) See *Re Newcastle's Estates*, 24 Ch. D. 129, 139 *sq.*; *Re Clitheroe Estate*, 28 Ch. 378; 31 Ch. D. 135; *Re Atherton*, 1891, W. N. 85.

(*h*) See note (*e*), above.

(*i*) See stat. 45 & 46 Vict. c. 38, ss. 3, 6, 21.

the tenant for life, are exercisable only with his consent. If, however, the settlor should have given to trustees larger powers over the settled land than are by the Act conferred upon the tenant for life, as if he should have authorized them to sell in consideration of the receipt of debentures of or shares in a company, or of the grant of a rentcharge, or to lease for longer terms than may be granted under the Act, these powers are perfectly valid (*k*); and it does not appear that they would be "exercisable for any purpose provided for in this Act" (*l*), so as to make the consent of the tenant for life necessary to their exercise (*m*). It has been suggested (*n*) that to the exercise of a power given to trustees for raising charges by mortgage or sale the consent of the tenant for life would not be necessary, on the ground that the trustees would have a title paramount to that of the tenant for life, and he could not prevent the raising of the charges. But with regard to a power conferred by the settlement to raise charges by sale, it must be remembered that the Settled Land Act, 1882 (*o*), authorizes the application of the proceeds of a sale of the settled land by the tenant for life under the power thereby conferred in the discharge of any incumbrances affecting the inheritance of the settled land or other the whole estate, which is the subject of the settlement. So that if the charges to be

(*k*) Stat. 45 & 46 Vict. c. 38, ss. 56 (1), 57; *Lonsdale* v. *Lowther*, 1900, 2 Ch. 687.

(*l*) See sect. 56 (2), above, p. 291, and n. (*d*).

(*m*) This statement assumes that by the exercise of the express power something will be done which the tenant for life could not do under his statutory power. But if by the exercise of a larger power than that conferred by the Act it were proposed to do something which could be done under the statutory power, as if under a power for trustees to grant building leases for any term not exceeding 120 years it were proposed to grant a building lease for 99 years on the same conditions as are authorized by the statutory power, the case is different; and the consent of the tenant for life would appear to be necessary.

(*n*) Wolstenholme's Conveyancing and Settled Land Acts, 387, 8th ed.

(*o*) Stat. 45 & 46 Vict. c. 38, s. 21 (ii).

raised should come within the definition of such incumbrances, their raising by sale would appear to be a purpose provided for in the Act; and it is thought that in such case it would not be safe to rely on an exercise of the express power of sale without the tenant-for-life's consent. As regards a power for trustees to raise charges by mortgage, prior to the Settled Land Act, 1890, a tenant for life had no general power to mortgage the settled land in order to raise money to discharge some incumbrance affecting the same; so that raising charges by mortgage was not a purpose provided for by the Settled Land Act, 1882. The Act of 1890 (*p*), however, empowered the tenant for life to mortgage the settled land for the purpose of raising money to discharge an incumbrance thereon. And as this Act and the previous Settled Land Acts are to be read and construed together as one Act (*q*), it seems that the raising of money by mortgage to discharge incumbrances is now a purpose provided for in the Acts, and consequently that an express power for this purpose conferred on trustees by the settlement is no longer well exercisable without the consent of the tenant for life. Where the settlement contains, not a mere discretionary power, but an imperative trust exercisable for some purpose provided for in the Act, it appears that the consent of the tenant for life to the exercise of the trust is not required (*r*).

Where two or more persons together constitute the tenant for life.

By the Settled Land Act, 1884 (*s*), where two or more persons together constitute the tenant for life for the purposes of the Settled Land Act, 1882, then, notwithstanding anything contained in the above cited provisions (*t*) of that Act requiring the consent of all

(*p*) Stat. 53 & 54 Vict. c. 69, s. 11.

(*q*) Sect. 2.

(*r*) See *Taylor* v. *Poncia*, 25 Ch. D. 646.

(*s*) Stat. 47 & 48 Vict. c. 18, s. 6 (2).

(*t*) Stat. 45 & 46 Vict. c. 38, s. 56 (2); above, p. 291, n. (*d*).

those persons, the consent of only one of those persons is to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement and exercisable for any purpose provided for in that Act. By the Act of 1882 (*u*), if in any case there are two or more persons beneficially entitled to possession of settled land as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for the purposes of that Act. In any such case, therefore, one only of such persons need now consent to the exercise by the trustees of the settlement, or any other person, of any power conferred by the settlement and exercisable for any purpose provided for in that Act. Where lands were given for the benefit of several persons in undivided shares, and some of the shares were given in fee and others limited to a donee for life with remainder over, and a power was given for trustees to sell the entirety of the premises, it was questionable whether the consent of the tenants for life of the settled shares was necessary to the exercise by the trustees of their power of sale over the entirety. For the power of sale conferred by the Settled Land Acts would embrace the settled shares only, and it was only as regards these shares that the land would be the subject of a settlement within the meaning of those Acts; so that the power to sell the entirety might be considered to be not a power conferred by the settlement and exercisable for a purpose provided for in the Acts, but a power altogether paramount to the settlement. But in a case (*x*) where a testator gave one-fifth part of his estate to each of his four daughters for life with remainder over, and gave the remaining fifth part to the children of a deceased

(*u*) Sect. 2 (5), (6).
(*x*) *Re Osborne and Bright's, Ltd.*, 1902, 1 Ch. 335.

daughter absolutely, and empowered trustees to sell the whole of his estate, Kekewich, J., held that there was a conflict between this express power of sale and the power of sale given by the Settled Land Acts, because the sale of the entirety would deprive the tenants for life of the settled shares of their statutory power to sell them; and that the consent of the tenants for life was therefore necessary to the exercise by the trustees of their express power of sale. And he further decided that the tenants for life of the four settled shares did not together constitute a tenant for life within the meaning of the Settled Land Act, 1882 (*y*), so as to enable the required consent to be given under the Act of 1884 (*z*) by one only of them.

Estate duty chargeable on land settled on trust for sale.

It must not be forgotten that, when land is settled either by deed or will on trust for sale and investment of the purchase money for the benefit of various persons in succession, and the lands are not immediately sold, estate duty will become payable on the death of any one of those persons, and will, it appears, become a charge on the land (*b*). On a purchase, therefore, from the trustees for sale under such a settlement, the purchaser, if he have notice of the trusts affecting the purchase money, must ascertain whether any estate duty has become so charged on the land sold since the Finance Act, 1894 (*c*), took effect; and he must be careful to require these trusts to be abstracted for this purpose.

Sale of land purchased in breach of trust.

If trust money be improperly invested in the purchase of land, it is the duty of the trustee to realise the investment at the earliest favourable opportunity, and

(*y*) Stat. 45 & 46 Vict. c. 38, s. 2 (5), (6).

(*z*) Stat. 47 & 48 Vict. c. 18, s. 6 (2).

(*b*) Above, pp. 241, 242.

(*c*) Stat. 57 & 58 Vict. c. 30, s. 9 (1); above, pp. 224, 234, 241, 242.

invest the proceeds in some manner authorized by the instrument which created the trust. The trustee is therefore empowered to sell the land, and can make a good title thereto and convey the same without the concurrence of the beneficiaries, notwithstanding that the purchaser have notice of the breach of trust; unless the beneficiaries, being all *sui juris*, have elected to take the land *in specie* (*d*).

Trustees' receipts.

Modern statutes have in effect abolished the old rule of equity, that any person paying money or assigning other personal estate to a trustee thereof was bound to see that the same was duly applied pursuant to the trust, unless exempted from that obligation by the intention of the author of the trust, either expressly declared or implied from the nature of the trusts (*e*). Under the Trustee Act, 1893 (*f*), the receipt in writing of any trustee for any money, securities or other property or effects, payable, transferable or deliverable to him under any trust or power, shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring or delivering the same from seeing to the application or being answerable for any

(*d*) *Re Patten and Edmonton Union*, 52 L. J. Ch. 787; *Power* v. *Banks*, 1901, 2 Ch. 487, 496; *Re Jenkins and Randall's Contract*, 1903, 2 Ch. 362; see above, p. 271; 2 Dart, V. & P. 687—689.

(*e*) *Lloyd* v. *Baldwin*, 1 Ves. sen. 173; Sug. V. & P. 657 *sq.*; Lewin on Trusts, 394 *sq.*, 6th ed.; 519 *sq.*, 10th ed.

(*f*) Stat. 56 & 57 Vict. c. 53, s. 20, replacing 44 & 45 Vict. c. 41, s. 36, and applying to trusts created either before or after the commencement of the Act. Also by Stat. 22 & 23 Vict. c. 23, the receipt of a trustee for any *purchase* or *mortgage money* payable to him is a good discharge, unless a contrary intention be expressly declared by the instrument creating the trust. Lord Cranworth's Act, stat. 23 & 24 Vict. c. 145, s. 29, provided that trustees' receipts should be good discharges for any *money* payable to them: but this provision applied only in the case of instruments executed on or after the 28th Aug. 1860, and was repealed by stat. 44 & 45 Vict. c. 41, s. 71. After the passing of Lord Cranworth's Act, however, the old practice of inserting in every instrument creating a trust a receipt clause, in terms similar to those of the present statutory provision, was discontinued; 3 Davidson, Prec. Conv. 222—226, 719, n., 3rd ed.

loss or misapplication thereof. It may be noted that this enactment does not justify the payment of money or delivery of securities to one only of several trustees. In such a case the money must be paid or other property assigned over to all the trustees, who should all join in giving the receipt (*g*).

Purchase by trustees.

According to the general rule of equity, trustees investing trust money in the purchase of lands were bound to see that they obtained a good marketable title (*h*). This rule, however, was not inflexible; it might be modified in its application according to the circumstances of particular cases. Thus if, considering the objects of the trust (such as the acquisition of land advantageous or convenient to be held with land already in settlement), the purchase were otherwise desirable, it appears that trustees would be justified in accepting a substantially safe holding title (*i*). And the rule has now been considerably relaxed by statute. Trustees purchasing land are expressly authorized to buy without excluding the application of the second section of the Vendor and Purchaser Act, 1874 (*k*). This exonerates trustees authorized to invest in the purchase of leasehold lands, held for a term of which less than forty years are unexpired, from the necessity of stipulating for the production of the lessor's title (*l*). Trustees are also specially protected in buying under the conditions im-

(*g*) *Hall* v. *Franck*, 11 Beav. 519; *Webb* v. *Ledsam*, 1 K. & J. 385; *Margetts* v. *Perks*, 12 W. R. 517; *Lee* v. *Sankey*, L. R. 15 Eq. 204; 3 Davidson, Prec. Conv. 223, n., 3rd ed.

(*h*) Lewin on Trusts, 437, 6th ed.; 508, 10th ed.; *Dance* v. *Goldingham*, L. R. 8 Ch. 902, 911.

(*i*) 1 Dart, V. & P. 89, 90, 5th ed.; 99, 100, 6th ed.

(*k*) Stat. 56 & 57 Vict. c. 53, s. 15, replacing 37 & 38 Vict. c. 78, s. 3; see above, pp. 35, 38, 39, 80, 153. Trustees purchasing need not, of course, exclude the operation of the first section of the Vendor and Purchaser Act, 1874; for that section altered the rule of law, and made a forty years' title an equally good marketable title as a sixty years' title was previously; see above, pp. 79, 153.

(*l*) See above, pp. 77, 80.

ported into contracts for sale by the Conveyancing Act of 1881 (*m*), when the period, for which title is by law required to be shown, is not curtailed by special stipulation. And it is now provided by the Trustee Act, 1893 (*n*), that a trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted. The standard so set is that to which trustees are now obliged to conform (*o*); and they should be careful, in buying lands with trust money, not to bind themselves by any condition of sale which will preclude them from requiring such a title as they ought to obtain. Trustees directed or empowered to purchase lands are frequently authorized by the express terms of the instrument creating the trust to purchase any hereditaments with less than a marketable title; but this scarcely allows them to adopt a lower standard than that now set by the Trustee Act, 1893 (*p*).

(*m*) Stat. 44 & 45 Vict. c. 41, s. 66; see above, pp. 35, 37, 80.

(*n*) Stat. 56 & 57 Vict. c. 53, s. 8 (3), replacing 51 & 52 Vict. c. 59, s. 4 (3).

(*o*) See *Re Theobald*, 19 Times L. R. 536.

(*p*) See Davidson, Prec. Conv. vol. iii. 250, 722, 3rd ed.; vol. iv. 55, 3rd ed.; 1 Dart, V. & P. 90, 5th ed.; 100, 6th ed.; Key & Elph. Prec. Conv. vol. ii. 537, 4th ed. It may be mentioned here that trustees investing trust money on a mortgage of lands were bound equally as on a purchase to invest on the security of property with a good marketable title; and there were not the same reasons in the case of an investment on mortgage for relaxing the stringency of the rule. It has long been the regular conveyancing practice expressly to authorize trustees to dispense with the investigation of the lessor's title in lending money on the security of leasehold hereditaments or otherwise to lend on any security with less than a marketable title; see the authorities last cited. And now the above-quoted enactment (sect. 8 (3) of the Trustee Act, 1893) applies equally in the case of trustees lending money on the security of any property as in that of a purchase; and by sect. 8 (2) of the same Act a trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed wholly or partially with the pro-

What kind of property should be bought by trustees for persons entitled successively.

Trustees authorized to purchase land to be held on trust for persons entitled in succession, as tenant for life and remainderman in fee, should take care that the property they buy is of a nature to confer upon all the persons so entitled their due share of the benefit to be derived from the purchase. Generally speaking, they should seek to obtain a property which will produce a fair immediate return in the way of income to the tenant for life, and is likely to continue to yield the same advantage to the remainderman after his death. They should avoid alike property which is wasting, or may be wasted, such as mines or timber, and property yielding no present profits, as a reversion or remainder to which no rent is incident, or an advowson (*q*). Even house property has been thought to be objectionable for purchase by trustees on the ground of its being liable to decay for want of repair and to destruction by fire (*r*). It has been held, however, that trustees authorized to invest in the purchase of "lands or hereditaments of an estate in fee simple in possession" were entitled to buy lands subject to building leases for ninety-nine years (*s*). Each case must, of course, be considered with reference to the terms and object of the power given to purchase. Thus, where it is intended that a large estate shall be purchased and conveyed to the usual limitations of a strict settlement, it is certainly allowable to buy lands bearing a fair proportion of timber (*t*); and at the present time it seems equally permissible to purchase land containing mines and minerals, so long as the mineral wealth does not form too large a part of the value of the property, since the mines can be worked and the profits equitably distributed between tenant for

duction or investigation of the lessor's title.

(*q*) Lewin on Trusts, 438, 439, 6th ed.; 570, 571, 572, 10th ed.

(*r*) Lewin on Trusts, 438, 6th ed.; 570, 571, 10th ed.

(*s*) *Re Peyton's Settlement Trust*, L. R. 7 Eq. 463; and see *Re Theobald*, 19 Times L. R. 536.

(*t*) Lewin on Trusts, 439, 6th ed.; 571, 10th ed.

life and remainderman under the powers given by the Settled Land Act, 1882 (*u*).

Valuation on behalf of trustees selling or purchasing.

Trustees selling land under a trust for or power of sale should, as a rule, obtain a valuation of the property from a competent professional surveyor acting for them independently and in nowise concerned on behalf of any purchaser, in order to guide them as to the sum to be accepted on a sale by private contract or to be fixed as the reserve price on a sale by auction. And trustees intending to purchase land should obtain similar advice with regard to the value of the land they propose to buy (*x*). But, of course, cases may occur in which trustees are practically safe in acting on their own judgment, as where obviously favourable terms are proposed to them. If all the *cestui-que-trusts* should be *sui juris*, and not too numerous, the best plan is to obtain their sanction as to the price to be taken, paid or fixed. Where a title depends on the exercise in the past of a trust for or power of sale or purchase of land, the purchaser may assume, if nothing appear to the contrary, that the trust or power was duly exercised to the best advantage of the *cestui-que-trusts* as regards price or value and otherwise; and he need not and should not make any inquiry or ask for any evidence as to this (*y*). But if it appear that the property was sold at an undervalue, or the trust or power was otherwise improperly exercised, the case is different and the title cannot safely be accepted (*z*).

(*u*) Stat. 45 & 46 Vict. c. 38, ss. 6, 9—11. See *Bellot* v. *Littler*, W. N. 1874, p. 156; 22 W. R. 836; 30 L. T. N. S. 861.

(*x*) Lewin on Trusts, 375, 376, 436, 6th ed.; 485, 567, 10th ed.; 1 Dart, V. & P. 90; above, p. 274. As to the valuation which ought to be obtained by trustees proposing to invest trust money on a mortgage of lands, see stat. 56 & 57 Vict. c. 53, s. 8.

(*y*) See *Borell* v. *Dann*, 2 Hare, 440, 449—452; *Ware* v. *Egmont*, 4 De G. M. & G. 460, 471—474; above, p. 97.

(*z*) See *A.-G.* v. *Pargeter*, 6 Beav. 150; *Ker* v. *Dungannon*, 1 Dru. & War. 509, 542; *Stevens* v. *Austen*, 3 E. & E. 685.

CHAPTER IX.

OF TITLE UNDER THE EXERCISE OF POWERS.

Title depending on exercise of a power of appointment.

WHERE the title depends on the exercise of a power of appointment, it is the duty of the conveyancer advising the purchaser to ascertain that the power has been or will be in all respects well executed. The general rule is that in the exercise of a power *all* conditions prescribed in the instrument creating the power must be strictly observed; and in this respect no distinction is made between matters apparently substantial, such as the nature of the instrument by which the power is to be executed or the requirement of the consent of any person to its execution, and formalities like the number of witnesses by which the executing instrument is required to be attested (*a*). And the rule is that any instrument showing an intention to exercise the power, but not exactly complying with the terms and conditions imposed by the donor of the power, is void altogether as an exercise of the power (*b*).

(*a*) *Hawkins* v. *Kemp*, 3 East, 410, 440; *Holmes* v. *Coghill*, 7 Ves. 499, 506; *Reid* v. *Shergold*, 10 Ves. 370; *Marjoribanks* v. *Hovenden*, 1 Drury, 11; Sug. Pow. 206 *sq.*, 8th ed.; Farwell on Powers, 128 *sq.*, 2nd ed.; Wms. Real Prop. 374 *sq.*, 19th ed.

(*b*) See previous note. This rule is modified in equity, though not at law, by the equitable doctrines mentioned below as to aiding the defective execution of powers; and is further modified in the case of powers of leasing by the Leases Acts, 1849 & 1850 (stats. 12 & 13 Vict. c. 26; 13 & 14 Vict. c. 17), under which an attempted exercise of a power of leasing, which is invalid at law for want of strict compliance with the terms of the power, may be considered in equity as a contract for the grant of a valid lease

Under the Wills Act (*c*), however, wills executing powers *must* be executed and attested by two witnesses in the manner therein prescribed for the execution of all wills (*d*); but if so executed and attested, they operate as valid executions of the power, notwithstanding that the instrument creating the power may have required some additional or other form of execution or solemnity. And under Lord St. Leonards' Act (*e*) powers of appointment, exercisable by deed or by any instrument in writing not testamentary, may be well exercised, subsequently to the Act, by a deed executed in the presence of and attested by two or more witnesses, in the manner in which deeds are ordinarily executed and attested, although the instrument creating the power may have required some additional or other form of execution or attestation, or solemnity. It will be observed that, where a power is required to be executed by a deed or writing attested by two witnesses, it is not well executed by a deed attested by one witness only or unattested (*f*). Such a defect of execution is not aided by Lord St. Leonards' Act. And it is expressly provided (*g*) that this statutory provision shall not operate to defeat any direction in the instrument creating the power that the consent of any person shall be necessary to a valid execution, or that any act shall be performed, in order to give validity to any appointment having no relation to the mode of executing and attesting the instrument. Nothing contained in the Act shall prevent the donee of a power from exercising it conformably to

under the power, and leases prematurely granted in exercise of a power are made valid if the lessor's estate endure until the time when the lease might have been well granted; Wms. Real Prop. 382, 383, 19th ed.

(*c*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 10.

(*d*) See, however, *Re Price*, 1900, 1 Ch. 442, as to wills intended to exercise powers and executed by persons domiciled out of England: but distinguish *Re D'Este's Settlement Trusts*, 1903, 1 Ch. 898.

(*e*) Stat. 22 & 23 Vict. c. 35, s. 12, passed 13th Aug. 1859.

(*f*) Sug. Pow. 207, 8th ed.

(*g*) Stat. 22 & 23 Vict. c. 35, s. 12.

the power by writing or otherwise than by an instrument executed and attested as an ordinary deed (*h*). Equity will aid the defective execution of a power, if the intended appointee be a purchaser from or the wife or a child or a creditor of the person intending to exercise the power, or if the appointment be for a charitable purpose (*i*). But such relief is only afforded to cure defects which are not of the essence of the power, such as the want of a seal or of the proper number of witnesses, or execution by will of a power to appoint by deed (*j*). And equity will not uphold an act which will defeat what the person creating the power has declared, by expression or necessary implication, to be a material part of his intention (*k*). No relief will therefore be given against the exercise by deed of a power to appoint by will (*l*), or against the exercise by will of a power to appoint by deed to be executed before a specified event, which happened in the lifetime of the person purporting to appoint by will (*m*). It must not be forgotten that where a power to appoint the legal estate in lands is exercised defectively, but so that equity will grant relief against the defective execution, the legal estate remains outstanding in the person entitled in default of appointment, and must be got in if it be desired to make title under the appointment (*n*).

Equitable relief against defective execution of a power.

Title under a special power of appointment.

Where a title depends on the valid exercise of a special power of appointment, such as a power to appoint amongst a limited class of persons (the appointor's children, for instance), the conveyancer must,

(*h*) Stat. 22 & 23 Vict. c. 35, s. 12.

(*i*) Sug. Pow. 533—536, 8th ed.; Farwell on Powers, 327, 2nd ed.

(*j*) Sug. Pow. 548 *sq.*, 558, 559, 560; Farwell on Powers, 330, 2nd ed.

(*k*) Rolt, L. J., *Cooper* v. *Martin*, L. R. 3 Ch. 47, 58; Sug. Pow. 560, 8th ed.

(*l*) *Reid* v. *Shergold*, 10 Ves. 370.

(*m*) *Cooper* v. *Martin*, *ubi sup.*

(*n*) Sug. Pow. 532, 8th ed.; Farwell on Powers, 327, 2nd ed.

of course, see that the appointment is made in favour of those persons who are objects of the power (*o*), or some or one of them (*p*). And he must further ascertain that the appointment does not transgress the rules of equity with respect to the fraudulent execution of such powers; as where an appointment is made ostensibly for the benefit of some object of the power but with the real design of effecting some other purpose than that contemplated by the power (*q*). Where these rules are transgressed, it must be remembered that the appointment, if of the legal estate in lands, may be void in equity only, but not at law (*r*); so that where a title depends on the avoidance of such an appointment, the legal estate may have to be got in from the appointee. Another point to be borne in mind in considering the exercise of powers of appointment amongst a limited class of persons is the question whether the appointment infringes any of the established rules with respect to remoteness of limitation. In such cases, the validity of the estates limited by the instrument exercising the power depends on the result of the inquiry whether they would have been valid if inserted in the instrument which created the power. And in investigating this point, the conveyancer must not forget that, as the law now stands, contingent remainders of the legal estate in lands are governed by rules peculiar to themselves; whilst in the case of limitations of future legal estates to arise by way of shifting use or executory devise or of future equitable estates or interests, the only test of validity is conformity with the rule against perpetuities (*s*).

Fraudulent execution.

Remoteness of limitation.

(*o*) See Sug. Pow. 498 *sq.*, 652 *sq.*, 664 *sq.*, 8th ed.; Farwell on Powers, 298 *sq.*, 486 *sq.*, 2nd ed.

(*p*) As to exclusive appointments, see Farwell on Powers, 362 *sq.*, 2nd ed.; Wms. Pers. Prop. 353, 15th ed.

(*q*) See Sug. Pow. 606 *sq.*, 8th ed.; Farwell on Powers, 403 *sq.*, 2nd ed.

(*r*) See Sug. Pow. 606—608, 8th ed.

(*s*) See Wms. Real Prop. 351—356, 395—406, 19th ed.; and the

Attestation clause to instruments exercising powers.

Where an instrument creating a power of appointment has required that certain acts done in connection with the exercise of the power (such as the signing, sealing and delivery of a deed or writing) shall be attested by witnesses, the attestation clause of the instrument exercising the power should be examined with special care, as the omission to express therein that some or one of such required acts has been duly attested may vitiate the exercise of the power. On this subject Mr. Justice Farwell (*t*) has laid down the following rule as the result of the authorities:—"If a power requires two or more formalities to be attested, and the attestation clause expressly certifies that one of such formalities has been performed, then the power is not well executed (*u*). But if the attestation, although a limited and special one, is of such a nature that it must necessarily be inferred that the other requisites were complied with (*v*), or if the attestation is general, then the execution is valid, unless the contrary is

writer's articles on Contingent Remainders and the Rule against Perpetuities in the Encyclopædia of English Law.

(*t*) Farwell on Powers, 135, 2nd ed.

(*u*) *Vincent* v. *Bishop of Sodor and Man*, 4 De G. & Sm. 294, 307; 5 Ex. 683, 694. In *Wright* v. *Wakeford*, 17 Ves. 454, 4 Taunt. 213, where a power of consent to a sale was required to be exercised by writing under hand and seal *attested* by two or more credible witnesses, and the attestation clause of the deed exercising the power only certified that it was sealed and delivered in the presence of two witnesses, it was held that the power was not well executed. The like defect in instruments exercising powers executed before the 30th July, 1814, was cured by stat. 54 Geo. III. c. 168: but this Act had no prospective operation.

(*x*) See *Vincent* v. *Bishop of Sodor and Man*, ubi sup., where a power required to be exercised by will signed and published in the presence of and attested by two or more witnesses was held to be well executed by a will purporting to be signed and sealed in the presence of two witnesses, on the ground that sealing in the presence of witnesses must naturally and reasonably be considered to be a publication of the will; *Smith* v. *Adkins*, L. R. 14 Eq. 402, where a power to be exercised by any instrument in writing signed, sealed and delivered in the presence of two or more witnesses was held to be well executed by a will stated in the attestation clause to be signed, sealed, published and acknowledged to be the last will of the donee of the power; this was on the ground that publication of a will is equivalent to delivery thereof.

shown" (*y*). This rule is, of course, subject to the above-mentioned provisions of the Wills Act and Lord St. Leonards' Act (*z*), which have greatly diminished its importance in practice.

Sale under statutory power.

When property is sold or conveyed in the exercise of a power created by statute, there is the same necessity for exact compliance with all the terms and conditions of the power as exists in the case of a power created by the act of parties (*a*); and in default of such compliance any instrument purporting to exercise the power is, as a rule, void (*b*). At the present time the most important statutory power of sale is that given by the Settled Land Acts, 1882 to 1890. When title is made by means of the exercise of this power of sale, the points to which the attention of the purchaser's counsel should be principally directed are the following:—In the first place he must ascertain that the property so conveyed or to be conveyed is settled land (*c*), and that the person who has exercised or is to exercise the power is a tenant for life or a person having the powers of a tenant for life within the meaning of the Acts (*d*). He must next inquire whether such property comprises the principal mansion-house on the settled land and the pleasure grounds and park and lands usually occupied therewith or any part of the same, and if so, he must see

Sales under the Settled Land Acts.

(*y*) See *Burdett* v. *Doe* d. *Spilsbury*, 10 Cl. & Fin. 340, where a power to be exercised by will signed, sealed and published in the presence of and attested by three witnesses was held to be well executed by a signed and sealed will with this attestation clause, "Witness, Charles Ball, Eliz. Ball, Ann Ball."

(*z*) Above, p. 303.

(*a*) Above, p. 302.

(*b*) *Davies* v. *Davies*, 38 Ch. D. 499; *Mogridge* v. *Clapp*, 1892, 3 Ch. 382, 398; *Sutherland* v. *Sutherland*, 1893, 3 Ch. 169; *Chandler* v. *Bradley*, 1897, 1 Ch. 315; *Re Handman and Wilcox's Contract*, 1902, 1 Ch. 599; *Boyce* v. *Edbrooke*, 1902, 1 Ch. 836. The Leases Acts, 1849 and 1850, apply to an intended exercise of a statutory as well as to an express power of leasing; see above, p. 302, n. (*b*).

(*c*) See stat. 45 & 46 Vict. c. 38, ss. 2 (1—4, 10), 3.

(*d*) See stat. 45 & 46 Vict. c. 38, ss. 2 (5—7), 58.

that the assurance of that part of the property was or shall be made with the consent of the trustees of the settlement or under an order of the Court as required by the Settled Land Act, 1890 (*e*). Thirdly, he must assure himself that the purchase money was or shall be paid to duly constituted trustees of the settlement for the purposes of the Acts (*f*), or into Court (*g*). Fourthly, he must be satisfied that all the estate, to which title is alleged or required to be made under this statutory power, has been or will be duly assured by the exercise of the statutory power of conveyance (*h*) by the tenant for life, either alone or with the concurrence of all other necessary parties, if any. He must also see that there is nothing in the whole transaction carried out by exercising the statutory power which is inconsistent with the duty of the tenant for life, in exercising the statutory power, as trustee for all parties entitled under the settlement (*i*). As is well known, a tenant for life intending to exercise the statutory power is required to give one month's previous notice of his intention to the trustees of the settlement (*k*), but a person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of the notice so required (*l*). It is therefore unnecessary, when title is alleged or promised under an exercise of the statutory power, to make any inquiry whether notice has been duly given to the trustees. And it is improper to make any such inquiry;

As to giving notice of an intended sale.

(*e*) Stat. 53 & 54 Vict. c. 69, s. 10, replacing 45 & 46 Vict. c. 38, s. 15. For the principles by which the Court is guided in exercising the jurisdiction so conferred, see *Re Ailesbury's Settled Estates*, 1892, 1 Ch. 506; *Bruce* v. *Ailesbury*, 1892, A. C. 356.

(*f*) See stats. 45 & 46 Vict. c. 38, ss. 2 (8), 38—40; 53 & 54 Vict. c. 69, s. 16.

(*g*) Stat. 45 & 46 Vict. c. 38, s. 22 (1).

(*h*) Stat. 45 & 46 Vict. c. 38, s. 20.

(*i*) See stat. 45 & 46 Vict. c. 38, s. 53; *Sutherland* v. *Sutherland*, 1893, 3 Ch. 169; *Chandler* v. *Bradley*, 1897, 1 Ch. 315; *Re Hardman and Wilcox's Contract*, 1902, 1 Ch. 599.

(*k*) Stats. 45 & 46 Vict. c. 38, s. 45; 47 & 48 Vict. c. 18, s. 5.

(*l*) Stat. 45 & 46 Vict. c. 38, s. 45 (3).

for if the purchaser ask this question and be informed in answer of facts disclosing some irregularity, he may lose the benefit of the protection undoubtedly afforded to those who abstain from inquiry (*m*). It has been held that it is not a condition precedent to making a valid contract for sale under the Settled Land Acts that the tenant for life should give notice of his intention to the trustees; he can enter into a binding contract for sale without giving any such notice (*n*), even though there be no trustees of the settlement in existence (*o*); and it will be sufficient to give the purchaser a good title if trustees be duly appointed before the contract is completed (*o*). But although the purchaser is not concerned to inquire whether notice of the intention to sell were given to the trustees, he is not equally unconcerned with the question, whether there are any trustees of the settlement in existence at the time when the statutory power is completely exercised by conveyance. The Act provides that capital money arising from a sale made thereunder shall be paid either to the trustees of the settlement or into Court, at the option of the tenant for life (*p*); and it is held that the existence of such trustees is a condition precedent to the exercise of this option (*q*). Consequently, a vendor selling under the Settled Land Acts cannot make a good title, where there are no trustees of the settlement for the purposes of the Acts and the purchaser has notice of this fact, by requiring the purchase money to be paid into Court and conveying in consideration of such payment (*r*); but trustees must first be duly appointed, and then the sale can be completed. It appears, however, that if the purchaser,

As to whether there are trustees of the settlement at the time of sale.

(*m*) See *Marlborough* v. *Sartoris*, 32 Ch. D. 616, 623; *Hatten* v. *Russell*, 38 Ch. D. 334, 344.

(*n*) *Marlborough* v. *Sartoris*, 32 Ch D. 616.

(*o*) *Hatten* v. *Russell*, 38 Ch. D. 334.

(*p*) Stat. 45 & 46 Vict. c. 38, s. 22 (1).

(*q*) *Hatten* v. *Russell*, 38 Ch. D. 334, 345; *Re Fisher and Grazebrook's Contract*, 1898, 2 Ch. 660.

(*r*) *Re Fisher and Grazebrook's Contract*, 1898, 2 Ch. 660; and see *Hughes* v. *Fanagan*, 30 L. R. Ir. 111.

supposing that there are trustees of the settlement in existence and in ignorance that there are not, pay the purchase money into Court in good faith at the vendor's request, he will obtain a good title by a conveyance in consideration of such payment (*s*). It seems therefore that, if on a sale under the Settled Land Acts it appear from the abstract that trustees of the settlement were duly constituted or appointed, a purchaser directed to pay his purchase money into Court need not inquire whether such trustees still remain in existence. But if it appear from the abstract that there are no such trustees in existence, then the purchaser must require trustees for the purposes of the Acts to be appointed, and cannot safely pay the money into Court and accept a conveyance accordingly, without first seeing that such appointment has been duly made. Where the vendor's title depends on a former exercise of the power of sale given by the Settled Land Acts whereon the purchase money was paid into Court, and it appears from the abstract that there were no trustees of the settlement in existence at the time when the power was exercised by conveyance, the purchaser should, it seems, take the objection that the power was not well exercised unless there were such trustees in existence at that time, and should require proof of their existence to be furnished accordingly. If, however, such proof cannot be furnished, it will have to be considered whether a good title can be made on the ground that the purchaser from the tenant for life, supposing that there were such trustees, bought in good faith in ignorance of the fact that there were none (*t*). It has been held in the case of a building lease made by a tenant for life under the Settled Land Acts in the absence of any trustees, where no capital money was payable on granting the lease, that the

(*s*) *S. C.*, 1898, 2 Ch. 662.
(*t*) Cf. *Re Handman and Wilcox's Contract*, 1902, 1 Ch. 599.

existence of trustees of the settlement was not a condition precedent to the validity of the lease, and that a purchaser from the lessee must presume, in the absence of evidence to the contrary, that the lessee acted in good faith and had no notice of the irregularity (*u*). But in such a case, the only necessity for trustees is that due notice of the intention to lease may be given to them; and lessees and purchasers are expressly exonerated from the obligation of inquiring as to the giving of such notice (*x*). Where, however, any capital money has to be paid by a lessee or purchaser, the case is different (*y*); and there is not the same statutory absolution from the duty of inquiring into the existence of trustees. But even on a sale of settled land, the trustees have no active duty to perform, if the tenant for life desire that the purchase money shall be paid into Court. And as it is provided that a purchaser dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have complied with all the requisitions of the Act (*z*), and it is presumed generally that everything is rightly done until the contrary be shown (*a*), it seems that in this case also it would be presumed that the purchaser from the tenant for life acted in good faith without notice of the irregularity (*b*); and if nothing appeared to rebut this presumption, the title would be unimpeachable.

Who are trustees for the purposes of the Settled Land Acts.

In ascertaining who are the trustees for the purposes of the Settled Land Acts of any given settlement, it should be borne in mind that such trustees must be either—(1) the persons who are for the time being

(*u*) *Mogridge* v. *Clapp*, 1892, 3 Ch. 382.
(*x*) Above, p. 308.
(*y*) *Mogridge* v. *Clapp*, 1892, 3 Ch. 400.
(*z*) Stat. 45 & 46 Vict. c. 38, s. 54.
(*a*) Above, p. 97.
(*b*) See *Mogridge* v. *Clapp*, 1892, 3 Ch. 382.

trustees under the settlement with power of sale of the settled land, or with power of consent to or approval of the exercise of such a power of sale (*c*); or (2) if there be no such trustees, the persons declared by the settlement to be trustees thereof for the purposes of the Acts (*d*); or (3) the persons appointed by the Court to be trustees under the settlement for the purposes of the Acts (*e*); or (4) if there be no trustees for the purposes of the Acts of any of the above-mentioned three classes, then the persons (if any) who are for the time being under the settlement trustees with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale; or (5) if there be no such persons as are fourthly described, then the persons who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the land to be sold, or with power of consent to or approval of the exercise of such a future power of sale, whether the power or trust take effect in all events or not (*f*). Each of these classes must be taken to include any trustees or trustee duly appointed under an express or statutory power to appoint new trustees as

(*c*) It is important to observe that trustees of a settlement, who have no such power of sale, consent or approval as above mentioned, are not trustees thereof for the purposes of the Acts unless they come within classes (4) or (5) introduced by the amending Act of 1890; see *Wheelwright* v. *Walker*, 23 Ch. D. 752, 761; *Re Morgan*, 24 Ch. D. 114; *Re Carne's Settled Estates*, 1899, 1 Ch. 324. But trustees with a power of sale exercisable with the consent of the tenant for life are trustees for the purposes of the Acts; *Constable* v. *Constable*, 32 Ch. D. 233.

(*d*) Stat. 45 & 46 Vict. c. 38, s. 2 (8).

(*e*) Sect. 38.

(*f*) Stat. 53 & 54 Vict. c. 69, s. 16. As to cases affected by this amendment of the law, see *Re Brown's Will*, 27 Ch. D. 179; *Wheelwright* v. *Walker*, 23 Ch. D. 752, 761; *Re Horne's Settled Estate*, 39 Ch. D. 84. When lands are limited to trustees in fee in trust for one of them for life and after his death on trust for sale or for others with power of sale, it has been held that all the trustees, including the tenant for life, are the trustees for the purposes of the Settled Land Acts; *Re Jackson's Settled Estate*, 1902, 1 Ch. 258.

well as the trustees originally appointed. It has been expressly provided that the statutory power of appointing new trustees shall apply to trustees for the purposes of the Settled Land Acts, whether appointed by the Court or by or under the settlement (*g*).

Deposit on sale by auction of settled land.

As we have seen (*h*), it is usual on sales by auction to stipulate for payment of a deposit to the auctioneer or the vendor's solicitors. If the sale be made by a tenant for life selling under the Settled Land Acts, the purchaser must see that the deposit is duly paid to the trustees of the settlement for the purposes of the Acts, or into Court, as the vendor may require, before he accepts a conveyance and pays the balance of his purchase money. Otherwise he cannot be assured that he is obtaining a valid conveyance; for unless the whole of the purchase money be paid to the trustees or into Court, as required by the Acts, the statutory power of sale is not well executed (*i*).

As to the power of conveyance under the Settled Land Acts.

With regard to the question, whether all the estate, to which title is alleged or required to be made, has been or will be sufficiently assured by the exercise of the statutory power of conveyance (*k*), the Settled Land Act, 1882 (*l*), empowers the tenant for life to convey by deed any land sold under the power of sale conferred by the Act for the estate or interest which is the subject of the settlement, and provides that such a deed shall be effectual to pass the land conveyed discharged from

(*g*) Stat. 56 & 57 Vict. c. 53, s. 47, replacing 53 & 54 Vict. c. 69, s. 17, passed to amend the law laid down in *Re Wilcock*, 34 Ch. D. 508.

(*h*) Above, p. 47.

(*i*) Above, pp. 307—309.

(*k*) Above, p. 308.

(*l*) Stat. 45 & 46 Vict. c. 38, s. 20. Exactly the same power of conveyance is given in the same section with regard to land exchanged, partitioned, leased, mortgaged or charged in exercise of the powers conferred by the Act, and also with regard to easements or other rights or privileges sold or leased under the same powers.

all the limitations, powers and provisions of the settlement, and from all estates, interests and charges subsisting thereunder, but *subject to and with the exception of*—(i.) All estates, interests and charges having priority to the settlement; and (ii.) all such other (if any) estates, interests and charges as have been conveyed or created for securing money actually raised at the date of the deed; and (iii.) all leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life.

What is "the settlement."

The Act contains (*m*) a very wide definition of the term *settlement*, extending it to any instrument or any number of instruments under or by virtue of which any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession. And this definition has received a liberal interpretation. Thus, in *Re Ailesbury and Iveagh* (*n*), lands have been limited by deeds dated in 1796 and 1826 to such uses as Charles and George should jointly appoint, and in default to the use of Charles for life with powers of jointuring a future wife; and Charles appointed a jointure rentcharge to Maria. Then by a deed of 1837 the lands were limited in exercise of the joint power of appointment, subject to the rentcharge, to the use of Charles for life, remainder to George for life, remainder to Ernest for life, remainder to Ernest's first son in tail male. In 1863, the estate tail so given

Re Ailesbury and Iveagh.

(*m*) Stat. 45 & 46 Vict. c. 38, s. 2 (1).
(*n*) 1893, 2 Ch. 345.

to Ernest's first son was barred and the lands were re-settled to the use of Ernest for life, remainder to his eldest son George John for life, remainder to uses for securing a jointure rentcharge to Evelyn, the son's wife, remainder to George John's first son in tail male. George John died leaving Thomas his eldest son, and in 1885 Thomas's estate tail was barred and the lands were re-settled to the use of Ernest for life in restoration of his former estate, remainder to Thomas for life. Ernest died, and Thomas sold the lands under the Settled Land Acts to Lord Iveagh. And it was held by Stirling, J., that the series of instruments constituting the settlement for the purposes of the Acts comprised not only the deeds of settlement of 1885 and 1863 taken together, but also those of 1837, 1826 and 1796, and consequently that Thomas was empowered to convey the lands sold discharged from Maria's as well as from Evelyn's rentcharge. This decision at first met with adverse criticism (*o*), but it has been approved by the Court of Appeal in the case of *Re Mundy and Roper's Contract* (*p*). In that case lands were limited in 1861 to the use of John for life, remainder to uses for securing a jointure rentcharge to Elizabeth, remainder to trustees for the term of one thousand years from John's death on trust to raise portions for his younger children, remainder to Francis for life, with powers of jointuring and charging portions for younger children and limiting a term to secure such portions, remainder to Francis's first son in tail male. In 1865 Francis appointed a jointure rentcharge to Louisa his wife, charged the lands with portions for his younger children, and limited a term of 1,500 years to secure such portions. John died, and in 1889 Francis and his eldest son disentailed, and the lands were re-settled

Re Mundy and Roper's Contract.

(*o*) 37 Sol. J. 336; Wolstenholme's Conveyancing and Settled Land Acts, 289, 7th ed.

(*p*) 1899, 1 Ch. 275.

with the concurrence of John's younger children, who released their portions, to the use that Francis might charge the lands with 5,000*l.*, remainder to uses for securing rentcharges to Millicent and Sophy (two of John's younger children) and Francis's eldest son, remainder to Francis for life without expressing that this should be in restoration of his former estate. Francis then sold the lands under the Settled Land Acts, and the purchaser objected that his life estate under the settlement of 1861 was not kept alive, and that he could not convey the lands discharged from his wife's jointure or his younger children's portions. It was held, however, by the Court of Appeal, that the deeds of 1861, 1865 and 1889 together constituted the settlement within the meaning of the Settled Land Acts, and that the tenant for life was accordingly empowered to convey the settled lands discharged from his wife Louisa's jointure and his younger children's portions charged in 1865 under the powers given by the deed of 1861; and it was considered that this result was effected by the intention of the Acts, and that it was immaterial that Francis's life estate under the deed of 1861 was not expressed to be restored to him by the re-settlement of 1889. These cases establish that when lands have been limited to various beneficiaries successively by a series of family settlements or re-settlements, and there is still subsisting in the lands any estate or interest (though it be no more than a rentcharge or a charge of portions) limited to a beneficiary by any deed of settlement earlier than that which conferred the estate of the tenant for life, then these deeds of settlement together constitute a settlement for the purposes of the Settled Land Acts, and the tenant for life can sell and convey the settled lands free from the estates or interests limited to beneficiaries by any of the earlier deeds. The term *beneficiaries* is here applied to persons taking some estate or interest by way of settlement,

that is to say, in consideration of marriage or natural affection or of effecting a family settlement or re-settlement; the rule does not extend to estates created by way of mortgage, or, apparently, on a sale in the strict sense of the word (*q*). The definition of the settlement has been further extended by the Settled Land Act, 1890 (*r*), providing that every instrument whereby a tenant for life, in consideration of marriage or as part or by way of any family arrangement, not being a security for payment of money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement, is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value within the meaning or operation of sect. 50 of the Act of 1882 (*s*).

The compound settlement.

When, however, a settlement for the purposes of the Settled Land Acts was first held to be constituted by a series of deeds of family settlement, the question arose, who could be the trustees of such settlement; for any trustees appointed by any of the deeds were only trustees of the family settlement made by that deed. The difficulty was solved by the appointment by the Court of trustees for the purposes of the Acts of the compound settlement (as it was called) constituted by the series of family settlements (*t*). It is accordingly necessary, whenever title is made through an exercise of the statutory power of sale by a tenant for life under such a compound settlement, for the purchaser's counsel to

Trustees of the compound settlement.

(*q*) Above, pp. 1, 277.

(*r*) Stat. 53 & 54 Vict. c. 69, s. 4, which is to apply and have effect with respect to every disposition before as well as after the passing of that Act, unless inconsistent with the nature or terms of the disposition.

(*s*) See *Re Ailesbury's Settled Estates*, 69 L. T. N. S. 493; *Re Tibbits' Settled Estates*, 1897, 2 Ch. 149; *Re Du Cane and Nettlefold's Contract*, 1898, 2 Ch. 96, 108—110.

(*t*) *Re Ailesbury and Iveagh*, 1893, 2 Ch. 345, 358, 359; *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 298.

satisfy himself that the persons who are alleged to be the trustees of the settlement are the duly constituted trustees of the compound settlement (*u*). In regard to this question, care must be taken to distinguish the cases where a tenant for life purports to convey the settled land for all the estate limited by a compound settlement from those in which he is really selling and conveying as tenant for life under a simple deed of family settlement, of which trustees for the purposes of the Settled Land Acts have been duly appointed. Where a deed of family settlement in the usual form has been executed containing powers of jointuring or charging portions and an appointment of trustees for the purposes of the Settled Land Acts, and these powers have been executed by some subsequent deed or deeds, the original deed still remains the settlement for the purposes of the Acts, and on a sale by the tenant for life thereunder the trustees thereof are the proper persons to receive the purchase money (*x*). The original deed also remains the settlement for the purposes of the Acts and the trustees thereby appointed remain the trustees of the settlement, notwithstanding the absolute assignment over (*y*) or the re-settlement of any estate limited by the original deed in remainder after the estate of the tenant for life (*z*). Where there has been a deed of settlement creating estates for life and in tail and appointing trustees for the purposes of the Settled Land

(*u*) See *Re Spencer's Settled Estates*, 1903, 1 Ch. 75.

(*x*) *Re Keck and Hart's Contract*, 1898, 1 Ch. 617; *Re Du Cane and Nettlefold's Contract*, 1898, 2 Ch. 96, approved *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 296. The earlier case of *Re Tibbits' Settled Estates*, 1887, 2 Ch. 149, which at first occasioned great difficulty to the profession, must now be taken as having decided no more than that it is within the jurisdiction of the Court to treat a deed of settlement followed by deeds exercising powers contained therein as together constituting a compound settlement and to appoint trustees of such compound settlement accordingly.

(*y*) *Wheelwright* v. *Walker*, 23 Ch. D. 752.

(*z*) *Re Knowles' Settled Estates*, 27 Ch. D. 707; *Re Du Cane and Nettlefold's Contract*, 1898, 2 Ch. 96, 101.

Acts, and afterwards a disentailing assurance has been executed with the concurrence of the tenant for life and a re-settlement made limiting the lands to the use of the tenant for life in restoration of his former estate or otherwise expressing the intention that the powers given to the trustees of the original deed of settlement shall not be destroyed (*a*), the tenant for life can exercise his statutory power of sale as tenant for life under the settlement made by the first deed and require the purchase money to be paid to the trustees for the purposes of the Settled Land Acts appointed by or under that deed. And it seems that he may do this, although his old life estate were not preserved, since the powers annexed thereto by the Acts are incapable of assignment or release (*aa*). As we have seen (*b*), where upon such a re-settlement the former estate of the tenant for life is not restored and the powers given by the original settlement are abandoned, the tenant for life can nevertheless, by an exercise of his statutory power, sell and convey all the estate limited by the compound settlement consisting of the original settlement and the re-settlement taken together; but in such a case trustees of the compound settlement must be duly appointed to receive the purchase money (*c*). It has further been considered that in such cases of a settlement and re-settlement, the re-settlement alone may be treated as the settlement for the purposes of the Settled Land Acts, notwithstanding that the settlement and re-settlement may together be treated as a compound settlement (*d*). If in such cases the tenant for life purport to sell and convey as tenant for life under the re-settlement alone, the purchase money can be paid to the trustees for the purposes of the Acts appointed by the deed of re-settle-

(*a*) See *Re Wright's Trustees and Marshall*, 28 Ch. D. 93.

(*aa*) See *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 296, 297; below, pp. 324, 337.

(*b*) Above, p. 316.

(*c*) See *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 294, 296, 298; *Re Spencer's Settled Estates*, 1903, 1 Ch. 75.

(*d*) *Re Du Cane and Nettlefold's Contract*, 1898, 2 Ch. 96; *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 295—296.

ment: but the assurance made by the tenant for life will only operate to convey the settled land discharged from the limitations of the re-settlement; and if on such a sale any estate or interest limited by the original settlement should be still subsisting, the persons entitled thereto must concur in the conveyance to the purchaser in order to release the same.

Principle to determine under what settlement one is tenant for life.

As above stated, the principle governing these decisions is that in determining whether a man is tenant for life under a series of instruments constituting a so-called compound settlement, or under what settlement he is tenant for life for the purposes of the Settled Land Acts, the true test is not whether he is *in* of his old estate or whether an intention of keeping alive the powers annexed to any former life estate of his has been expressed, but regard is to be had solely to the intention of the Acts and the definitions therein contained; for the powers conferred by the Acts acquire their validity, not from any antecedent act or intention of the parties to a settlement, but from the sovereign power of the legislature alone (*e*). This principle, however, appears to have been diregarded by Farwell, J., in the case of *Re Cornwallis West and Munro's Contract* (*f*), of which the material facts appear to be these:—By virtue of a settlement made by will lands were limited to the use of A. for life, with remainder to the use of B. in tail male, and a jointure rentcharge was limited to issue thereout to the use of C., A.'s wife. A. and B., by a disentailing assurance duly enrolled, granted the lands to X. and Y. and their heirs, to such uses as A. and B. should jointly appoint; and by a deed of re-settlement A. and B., in exercise of this power, appointed the lands to such uses as they should by deed jointly appoint, and, in default of appointment, to the use that B. should receive thereout a yearly rentcharge,

Re Cornwallis West and Munro's Contract.

(*e*) See *Re Ailesbury and Iveagh*, 1893, 2 Ch. 345; *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 293—297.

(*f*) 1903, 2 Ch. 150; 72 L. J. Ch. 499.

and subject and charged as aforesaid to the use of A. for life in restoration of his former estate under the will, with remainder to B. in fee; and D. and E. were appointed to be trustees *of the deed of re-settlement* for the purposes of the Settled Land Acts. A. afterwards contracted to sell the lands as tenant for life selling under these Acts, and he proposed to make title as tenant for life under the deed of re-settlement, the purchase money being paid to the trustees appointed thereby, and C., the jointress, concurring in the conveyance to release her jointure. The purchaser objected to the title so offered on the ground that the will and the re-settlement constituted a "compound settlement," and that, without the appointment by the Court of trustees of such compound settlement, a good discharge for the purchase money could not be given. Farwell, J., upheld this objection on the ground that A.'s old life estate under the will had been restored to him, and so the only settlement under which A. could exercise his statutory power of sale was the compound settlement created by the will and the deed of re-settlement together. In so deciding the learned judge professed to follow the case of *Re Mundy and Roper's Contract* (*g*); but it is respectfully submitted that his decision is exactly opposed to the principles governing the judgment in that case and is manifestly wrong (*h*).

(*g*) Above, p. 315.

(*h*) The Court of Appeal in *Mundy's case* adopted the view of eminent real property lawyers that the words "in restoration of his former life estate" have no real conveyancing value except as an expression of intention that the express powers appendant to that estate shall not be destroyed; Sug. Pow. 71, 8th ed.; Davidson, Prec. Conv. iii. 596, 3rd ed.; 1899, 1 Ch. 294. And the opinion of conveyancers certainly was that where upon a re-settlement a life estate was limited to a man in restoration of his former life estate, he was tenant for life under the new settlement as well as the old; see the form of re-settlement given in Davidson, Prec. Conv. iii. 1030, 1039, 1059, 1060, where after limiting the first life estate to A. in restoration of his former estate, the powers of leasing and of consent to the exercise of the power of sale are given to "every person *hereby made* tenant for life" (when in possession) without naming any person. Besides, it may well be asked, how in *Cornwallis West's case* could B. have

The courses open to a tenant for life after a re-settlement.

It appears, then, that in the common case of a settlement of lands on one for life with remainder in tail followed by a disentailing assurance and a re-settlement again limiting a life estate in the lands to the original tenant for life, the following courses are open to him in selling the lands under the Settled Land Acts. First, whether his life estate were or were not limited to him in restoration of his former estate, he may sell as tenant for life under the compound settlement constituted by the settlement and the re-settlement together and convey the whole estate limited by such compound settlement: but then trustees of the compound settlement must first be appointed; and, unless all persons beneficially interested be *sui juris*, this can only be done by the Court (*i*). Secondly, if his life estate were limited in restoration of his former life estate or such life estate and the powers of the trustees appointed by the old settlement were otherwise keep alive, or even (so it seems) if his old life estate were not preserved (*k*), he may sell as tenant for life under the old settlement, the purchase money being paid to trustees for the purposes of the Settled Land Acts duly appointed under the old settlement. Thirdly, it is submitted that, on the principles laid down in *Re Mundy and Roper's Contract* (*l*), he may sell as tenant for life under the re-settlement alone, when the trustees of the re-settlement may receive the purchase money; but in that case he can only convey the estate which was the subject of the re-settlement. This is certainly so where his life estate was not limited to him in restoration of his former estate (*m*); and should be so, although his life estate

acquired a rentcharge in priority to A.'s life estate unless A.'s estate had been entirely taken away from and then given back to him? But if the deed of re-settlement did indeed restore to A. that life estate with which he had previously parted, how can it be reasonably denied he was tenant for life under the re-settlement?

(*i*) *Re Spencer's Settled Estates*, 1903, 1 Ch. 75.

(*k*) Above, p. 319.

(*l*) Above, pp. 315—320.

(*m*) Above, p. 319, and n. (*d*).

were limited in restoration of his former estate. But in the latter case, a difficulty is raised by the decision in *Cornwallis West's case* (*n*); and so long as that decision is not overruled, a purchaser could not be advised to accept the title as upon a sale under the re-settlement alone, if the estate of the tenant for life had been thereby given to him in restoration of his former estate.

The exceptions to the tenant-for-life's power of conveyance.

Estates, &c. having priority to the settlement.

As we have seen (*o*), the tenant for life is empowered to sell and convey the settled land discharged from all the limitations of the settlement, and from all estates or interests subsisting or to arise thereunder, except, first, all estates, interests, and charges having priority to the settlement. These may be exemplified by a lease granted or a mortgage made previously to the settlement, and also by charges to which a statutory priority is given, such as estate duty (*oo*) or rentcharges created under the Improvement of Land Act, 1864 (*p*). And where there has been a settlement followed by a re-settlement or re-settlements, and the vendor purports to sell as tenant for life under the re-settlement or the last re-settlement alone, then, as we have seen (*q*), that re-settlement will be the settlement for the purposes of the Acts, and any estate or interest still subsisting, which has been created by or under some instrument of earlier date than that re-settlement, will be an estate or interest having priority to "the settlement" (*r*). The second exception is of all such *other* estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed, whereby the tenant for life exercises his power of conveyance. The word *other* seems to relate here to the estates mentioned in the first exception; so that

Estates, &c. conveyed or created for securing money actually raised.

(*n*) Above, p. 320.
(*o*) Above, p. 313.
(*oo*) Above, p. 238.
(*p*) Stat. 27 & 28 Vict. c. 114; see ss. 49 *sq.*, 59.
(*q*) Above, p. 319.
(*r*) *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 289, 290.

apparently the second exception is of all such estates, &c., other than those having priority to the settlement, as have been conveyed or created for securing money actually raised. The mention of estates conveyed or created for *securing* money seems to point to estates conveyed or created by way of mortgage or charge, and to exclude those conveyed or created on an absolute sale (*s*). The plain meaning of the second exception, then, seems to be that where any estate or interest, limited either by the settlement itself or in exercise of any power contained therein, has been conveyed or created by way of mortgage or charge to secure money actually raised, then the tenant for life has no power to convey the same under the Settled Land Acts. This view, which the writer maintained in a work published soon after the passing of the Settled Land Act, 1882 (*t*), has been confirmed by the judgment of Lindley, M. R., and Chitty, L. J., in *Re Mundy and Roper's Contract* (*u*). Commenting on the exceptions to the tenant-for-life's power of conveyance, they say: "The second is important as showing an express restriction on the power of the tenant for life. We find in it a principle. Mortgagees who have actually lent their money on the security of the land are regarded as strangers to the settlement, and are not to have the security which they bargained for on the land itself transferred to the purchase money at the will of the tenant for life."

Mortgages by the tenant for life of his life estate.

With regard to mortgages by the tenant for life under a settlement of his life estate, it is expressly provided by the Settled Land Act, 1882 (*x*), that though the powers thereby given to a tenant for life are not capable of assignment or release, do not pass

(*s*) See *Wheelwright* v. *Walker*, 23 Ch. D. 752.

(*t*) Williams's Conveyancing Statutes, 323.

(*u*) 1899, 1 Ch. 275, 289; above, p. 315.

(*x*) Stat. 45 & 46 Vict. c. 38, s. 50.

to his assignee, and remain exercisable by him notwithstanding any assignment of his life estate, yet the rights of an assignee for value of the estate or interest of the tenant for life shall not be affected without his consent, except that such consent shall not be necessary for the making of leases by the tenant for life at the best rent that can reasonably be obtained, without fine, and otherwise in conformity with the Act. In this enactment "assignment" includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance, and "assignee" has a meaning corresponding with that of assignment (*y*). It is sufficiently clear from this enactment that, where a tenant for life has mortgaged his life estate, he cannot make a valid title on a sale of the settled land under the Settled Land Acts without the concurrence of his mortgagee (*z*). The opinion has, moreover, been judicially expressed that mortgages by the tenant for life of his life estate, being estates or interests conveyed for securing money actually raised, come within the second exception above mentioned (*a*) out of the tenant-for-life's power of conveyance, and cannot for this reason be displaced by an exercise of the statutory power of sale (*b*). Where mortgages have been made for raising portions or other gross sums of money charged on the settled lands, there can be no doubt that the mortgagees' estates fall within the exception of estates conveyed or created for securing money actually raised (*c*), and this appears to be the case whether the mortgagees'

Mortgages for raising portions, &c.

(*y*) Sect. 50 (4).

(*z*) *Re Sebright's Settled Estates*, 33 Ch. D. 429, 437, 438; *Cardigan* v. *Curzon-Howe*, 40 Ch. D. 338, 340, 341; *S. C.*, 41 Ch. D. 375.

(*a*) P. 323.

(*b*) North, J., *Re Sebright's Settled Estates*, 33 Ch. D. 429, 438; Chitty, J., *Cardigan* v. *Curzon-Howe*, 40 Ch. D. 338, 342, where note that he completely misrepresented the view expressed by North, J., in the former case.

(*c*) North, J., *Re Sebright's Settled Estates*, 33 Ch. D. 429, 438; Stirling, J., *Re Du Cane and Nettlefold's Contract*, 1898, 2 Ch. 96, 108; *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 289, 290.

estates were directly limited to them by or in exercise of some power contained in the settlement, or were created by the conveyance to them by way of mortgage of some term of years or other interest limited by or in exercise of some power contained in the settlement to trustees for raising the portions or other sums charged. And it seems to be immaterial whether the term to secure the portions were limited in priority to or in remainder after the estate of the tenant for life; in either case he can only displace the term by his statutory power of conveyance before the sums charged for portions have been actually raised by mortgage thereof, not after (*d*).

Mortgages by the remainderman.

The question then arises whether, when lands are settled on one for life with remainder over, and the remainderman has mortgaged his estate, the tenant for life can sell and convey the settled lands discharged from the mortgagee's estate. As we have seen (*e*), it has been held that where the remainderman has made an absolute assignment over or a re-settlement of his estate, the tenant for life is enabled to displace by his statutory power of conveyance the estate of the remainderman's assignees. But in the case of a mortgage or charge made by the remainderman before the date of the tenant-for-life's statutory conveyance, the mortgagee's estate or interest appears to be an estate or interest conveyed or created for securing money actually raised, and so to fall within the terms of the above-mentioned (*f*) second exception from the power of conveyance given by the Settled Land Acts. And such judicial *dicta* as have been delivered upon the construction of this exception (*g*) favour the opinion

(*d*) See the last two authorities cited in the previous note.

(*e*) Above, pp. 318, 324.

(*f*) Above, p. 323.

(*g*) Above, pp. 324, 325.

that where *any* estate or interest limited by the settlement has been conveyed by way of mortgage to secure money actually raised, the mortgagee's estate, interest or charge, cannot be displaced or affected by the tenant-for-life's conveyance. It is true that the exact point has not been decided, and eminent conveyancers have argued in favour of the contrary construction (*h*). The result of holding that a purchaser from a tenant for life does not obtain the estate of a mortgagee from the remainderman would also be inconvenient, and it is probable that the Courts would endeavour to avoid this conclusion. But in view of the precise words of the Act, the definite principle laid down by the Court of Appeal (*i*), and the judicial pronouncement of the inclusion in the exception not only of a mortgage of the life estate, but also of a mortgage of a term for raising portions limited in remainder after the life estate (*k*), it does not seem safe for a purchaser from a tenant for life selling under the Settled Land Acts to accept the title, where the remainderman has mortgaged his estate, unless, of course, the mortgagee concur in the conveyance. Where lands are settled on one for life with remainder to another in fee simple, and the two have joined together in mortgaging the lands in fee, there can be no doubt that the tenant for life cannot make a good title on a sale under the Settled Land Acts without the concurrence of the mortgagee. And the case is the same where a term has been limited in remainder after the estate of the tenant for life in trust to raise portions for his younger children, and the tenant for life, desiring to raise some portion in his lifetime, has joined with the trustees of the term in a mortgage of

Mortgage by tenant for life and remainderman.

(*h*) 1 Key & Elph. Prec. Conv. 506, 4th ed.; 480, 7th ed.; Wolstenholme's Conveyancing and Settled Land Acts, 321, 7th ed.; 339, 8th ed. The opinions there expressed are criticised by the present writer in 13 L. Q. R. 320 and 43 Sol. J. 274.

(*i*) Above, p. 324.

(*k*) Above, pp. 325, 326.

the term together with his life estate (*l*). The third exception from the estates, which the tenant for life is empowered by the Settled Land Acts to convey (*m*), needs no comment.

Purchaser from tenant for life should require evidence of the non-existence of estates, &c. which the latter cannot convey.

As the tenant for life is only empowered to convey the settled land for the estate or interest which is the subject of the settlement, and with the exceptions above mentioned (*n*), it is of the highest importance for a purchaser from a tenant for life selling under the Settled Land Acts to ascertain, first, that the estate or interest which is the subject of the settlement is the whole fee simple or other estate contracted to be sold; and, secondly, that there is not any subsisting estate, interest, or charge, in or upon the lands sold which will not pass under the vendor's statutory conveyance. With regard to the first of these requirements, the purchaser's counsel must ascertain from the abstract whether the settlor were seised of or otherwise well entitled to the whole estate in fee simple or other interest sold. And if this were the case, the tenant for life under the settlement can well convey the same estate or interest by an exercise of his statutory power of sale, even though the settlor did not dispose of his whole interest by the settlement. For the Settled Land Act, 1882 (*o*), pro-

(*l*) See *Cardigan* v. *Curzon-Howe*, 40 Ch. D. 338, 343, where Chitty, J., suggested that the estates, interests, and charges mentioned in the second exception should be confined to those subsisting or to arise under the settlement, meaning, apparently, those limited by the settlement directly or in exercise of some power contained therein. But he pointed out that, if this construction were adopted, mortgages by a person entitled under the settlement of his estate would not be estates subsisting or to arise under the settlement, and would not therefore fall within the enabling words of sect. 20 of the Settled Land Act, 1882 (see above, pp. 313, 314). So that, whether this view be adopted or whether it be considered, as suggested in the text, that the estates created by mortgages of the estates of persons directly entitled under the settlement are estates *conveyed* for securing money actually raised, there remains the same inability of the tenant for life to convey the mortgagees' estates by whomsoever created.

(*m*) Above, p. 314.

(*n*) Above, pp. 314, 323.

(*o*) Stat. 45 & 46 Vict. c. 38, s. 2 (2).

vides that an estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is, for the purposes of the Act, an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement. In order to ascertain whether there are any estates or interests coming within the exceptions out of a tenant-for-life's statutory power of conveyance, a purchaser from him should inquire, first, whether there are still subsisting in or upon the lands sold any estates, interests, or charges, having priority to the settlement; secondly, whether any estates, interests, or charges in or upon the lands sold have been conveyed or created for securing money actually raised; and, thirdly, whether any such leases or grants as are mentioned in the third exception (*p*) have been made of the lands sold or any part thereof or any interest therein. As the conveyance or creation of such an estate, interest, or charge, or the making of such a lease or grant, is an event which, if it took place, must necessarily have affected the title, it appears that the purchaser is entitled not only to insist upon an answer to this inquiry, but also to require evidence that no such event has occurred (*q*). In regard to most of the subjects of this inquiry, sufficient evidence may be afforded by a statutory declaration by the vendor that he has not made and does not know of any such estate, interest, charge, lease, or grant, and by solicitors, who have acted for the vendor and his predecessors, that they know of none, coupled with the facts of possession of the lands sold having gone and the custody of the title deeds being in accordance with the abstracted title (*r*). These facts, however, afford no evidence that a remainderman under the settlement has

(*p*) Above, p. 314. (*q*) Above, pp. 104—106.
(*r*) See above, pp. 104—106.

not mortgaged his estate, for the mortgagee of an estate in remainder is not entitled to possession either of the land or the deeds (*s*); and if the remainderman were notoriously in the direct line of settlement of some important estate, it is far from improbable that a mortgage of the remainder will have been effected without production of the title deeds to the mortgagee. In view, however, of the difficulty raised by the words of the Settled Land Act, 1882 (*t*), as to the displacement by the tenant-for-life's conveyance of the estate of a remainderman's mortgagee, it seems desirable for a purchaser from a tenant for life selling under the Act to inquire expressly, in addition to the inquiry suggested above (*u*), whether any mortgage or charge has been made of the estate or interest of any person entitled under the settlement in remainder after the vendor's life estate, and whether the title deeds have ever been produced or required to be produced at the instance of any such person for effecting a mortgage or charge of his estate or interest or for any other purpose. A further safeguard is to ascertain, on comparison of the abstract with the title deeds, what estates are limited in remainder after the life estate, and to seek for information about the persons entitled thereto. For example, if the immediate remainderman be an infant entitled in tail he cannot have made a valid mortgage, and it is not likely that any subsequent remainderman will have made a mortgage. Where the immediate remainderman is entitled in tail and is of age, it is a prudent precaution to search for any disentailing assurance which he may have executed. Such caution may appear excessive; and the truth is that the objection, that a purchaser from a tenant for life may take subject to a mortgage made by the remainderman, has been generally

(*s*) Wms. Real Prop. 580, 19th ed.

(*t*) Stat. 45 & 46 Vict. c. 38, s. 20; above, pp. 314, 323, 324.

(*u*) P. 329.

disregarded by the profession, probably because such mortgages are not very often made, an estate in remainder in lands being a particularly ineligible security (*x*). But that the possibility of the remainderman having mortgaged cannot be safely neglected is shown from the history of the Ailesbury estates, which have furnished two leading cases on the construction of the Settled Land Acts (*y*). In 1884 those estates stood limited to the use of Ernest, Lord Ailesbury, for life, with remainder to Lord Savernake in tail. The latter converted his estate tail into a base fee so soon as he had attained the age of twenty-one, and at once created mortgages thereon to the amount of £112,000 (*z*). Could a purchaser from a tenant for life in similar circumstances possibly be well advised to accept the title without the mortgagees' concurrence?

Can a tenant for life ever make a good title under the Settled Land Acts?

It may be asked whether, if the force of this objection be admitted, a tenant for life selling under the Settled Land Acts can ever make such a title as an unwilling purchaser buying under an open contract would be forced to accept. In truth, this seems very doubtful. We have seen (*a*) that a vendor need not have the whole estate sold vested in himself in order to make a good title; it is sufficient if he can prove that he has a power enabling him to convey the same. But a tenant for life is not invested by the Settled Land Acts with a power to convey the whole fee simple or other estate which is the subject of the settlement. On the contrary, he is only empowered to convey that estate with certain specified exceptions (*b*), and the *onus* lies on him

(*x*) See Wms. Real Prop. 463, 13th ed.; 580, 19th ed. It is thought, however, that such mortgages are made, in connection with policies of assurance, more frequently than is commonly supposed.

(*y*) *Bruce* v. *Ailesbury*, 1892, A. C. 356; *Re Ailesbury and Iveagh*, 1893, 2 Ch. 345.

(*z*) See *Re Ailesbury's Settled Estates*, 1892, 1 Ch. 506, 509; *Re Ailesbury and Iveagh*, 1893, 2 Ch. 345—347.

(*a*) Above, p. 131.

(*b*) Above, pp. 313, 314.

of proving that, in his particular case, none of these exceptions applies. If he have no power to convey to the purchaser the estate of a mortgagee from a remainderman, then he is bound to prove that no such mortgage exists; and what evidence can possibly be offered which will prove this fact with absolute certainty? The statement by the tenant for life that no such mortgage has been made is no evidence at all; for the matter is not within his knowledge. Nor is such a statement by the remainderman himself conclusive (*c*). And no inference can be drawn nor presumption arise from the fact that the possession of the land and of the title deeds has remained with the tenant for life (*d*). Is not the case, then, analogous to that of a title depending on the fact that the vendor bought without notice of some equitable incumbrance, or that a conveyance, originally voidable by the grantor as voluntary, had not been rendered indefeasible by some subsequent dealing for value? (*e*) If so, it appears to fall within a well-recognized class of the titles which Courts of equity consider too doubtful to force upon an unwilling purchaser (*f*). We have put the case of a vendor selling under an open contract: but it is questionable whether his position would be altered for the better if he purported to sell as tenant for life selling under the Settled Land Acts. And as regards the recovery of the deposit in such a case (*g*), it does not appear that at law a vendor can enforce a contract of sale of land, where the title depends on proof of a fact, unless he can prove that fact to be reasonably certain. This cannot be done without production of the best

(*c*) See notes (*e*), (*h*), below.

(*d*) Above, p. 330; cf. above, pp. 105, 106.

(*e*) See *Johnson* v. *Legard*, T. & R. 281, 294; *Clarke* v. *Willott*, L. R. 7 Ex. 313; below, Ch. X. § 4.

(*f*) *Freer* v. *Hesse*, 4 De G. M. & G. 495, 503, 504; *Nottingham Patent Brick and Tile Co.* v. *Butler*, 16 Q. B. D. 778, 787, 789, 790; *Re Handman and Wilcox's Contract*, 1902, 1 Ch. 599, 608, 609; above, pp. 106, 107, 157, 158.

(*g*) See above, pp. 165—168.

evidence available; that is to say, in the present instance, the oath of the remainderman himself; and it appears doubtful whether even the uncontradicted statement of the remainderman that he had made no mortgage would reduce that fact to the reasonable certainty required (*h*).

What the practice has been.

In practice, however, sales under the Settled Land Acts have been regularly carried through without the slightest regard to this objection (*i*). At most, the inquiry above suggested (*k*) is put, and the answer that the vendor knows of no estate, which has been conveyed or created for securing money actually raised, is accepted. In the majority of cases the risk run is not great; purchasers are generally willing; and where it is not known that there is some existing mortgage by the remainderman, a purchaser taking the objection in question would scarcely be placed in a favourable position before the Court. At the same time, the danger, though remote, is real. For if the tenant for life cannot displace by his conveyance the estate of the remainderman's mortgagee, then the mortgagee can have no lien or claim on the remainderman's interest in the purchase money, and, if the mortgage debt remained unpaid, could only enforce his security as against the land itself. And it is important to note that in such case the purchaser would, in general, have no remedy under the vendor's covenants for title (*l*); for on a sale

(*h*) See *Jeakes* v. *White*, 6 Ex. 873; *Simmons* v. *Heseltine*, 5 C. B. N. S. 554; *Scott* v. *Nixon*, 3 Dru. & War. 388, 402; *Clarke* v. *Willott*, L. R. 7 Ex. 313.

(*i*) See above, pp. 327, n. (*h*), 330.

(*k*) Above, p. 329.

(*l*) *Quære*, whether in such case the purchaser would not have an equity to stand in the remainderman's place as regards the purchase money, or so much thereof as was equal to the amount of the mortgage debt. The purchase money, it should be noted, is paid, not to the vendor, but to the trustees on trust for the persons entitled under the settlement. But if the remainderman's estate at law never passed by the tenant-for-life's conveyance, because of the mortgage could the trustees be in equity trustees of the whole purchase money for the remainderman? Or if the sale had been completed while the parties were

by a tenant for life under the Settled Land Acts, these covenants, where they would otherwise extend to the acts and incumbrances of the settlor and persons claiming through or under him (*m*), are usually limited, as regards the remainder expectant on the vendor's life estate, so as not to guarantee indemnity against the acts or defaults of any person other than the vendor, his heirs and assigns (*n*). It is submitted that for this reason, where a purchaser, who bought under an open contract, is offered a title and conveyance under the Settled Land Acts, he should at least, if he accept the title, decline to accept any such limitation of the vendor's covenants for title (*o*). For this reason, too, it is suggested that an intending purchaser by private contract from a tenant for life selling under the Settled Land Acts should insist on the insertion in the contract of an express stipulation that the vendor shall give the same covenants for title as he would be required to give if he were seised of the lands sold in fee.

As to seeing that a tenant for life selling has not committed any breach of his duty as trustee.

With regard to the general necessity for a purchaser from a tenant for life selling under the Settled Land Acts to see that the terms of the sale involve no breach of duty on the vendor's part (*p*), sales under these Acts are required to be made at the best price that can be reasonably obtained (*q*); and the tenant for life, in exercising any power under the Acts, is required to have regard to the interests of all parties entitled under the settlement, and is in the position and has the

under a *common* mistake of fact, *both* supposing that the remainderman had made no mortgage, when in fact he had, could not the transaction be set aside after completion? See *Scott* v. *Coulson*, 1903, 1 Ch. 453; affirmed, 1903, 2 Ch. 249.

(*m*) See Williams's Conveyancing Statutes, 75—81, 86.

(*n*) See 1 Dart, V. & P. 619, 620; Davidson, Prec. Conv. vol. ii. pt. i. 261, n., 262, 4th ed.; 2 Key & Elph. Prec. Conv. 264, 265 and n. (*c*), 4th ed.; 249 and n. (*e*), 7th ed.

(*o*) See below, Chap. XII. § 3.

(*p*) Above, p. 308.

(*q*) Stat. 45 & 46 Vict. c. 38, s. 4 (1).

duties and liabilities of a trustee for those parties (*r*). But it is enacted that, on a sale under the powers given by the Acts, a purchaser dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of the Acts (*s*). This provision, however, does not protect a purchaser who has notice of some improper dealing on the part of the tenant for life. Thus, if the terms of the proposed sale reserve any advantage to the tenant for life personally to the detriment of the remaindermen, the statutory power will not be well exercised, and the vendor's conveyance will be void as an assurance under the Settled Land Acts (*t*). For example, the payment of a commission to the tenant for life would certainly invalidate the sale (*u*); so would a stipulation that the purchaser shall grant to the vendor a lease for years of the lands sold or any part thereof, as the benefit of such a lease would form part of the vendor's own estate, and would go on his death to his executors or administrators, and not to the persons entitled under the settlement. A stipulation in a contract for sale by a tenant for life under the Settled Land Acts that the purchaser shall pay all the vendor's costs and expenses of and incident to the sale,

Stipulation that the purchaser shall pay the vendor's costs of the sale.

(*r*) Sect. 53. As to the duties of trustees for sale, see above, pp. 274 *sq.* As the purchase money may, at the direction of the tenant for life, be invested in real securities, he may well agree, on exercising his statutory power of sale to leave a proper proportion of the purchase money on mortgage; see above, p. 278 and n. (*r*): but in such case the trustees of the settlement are not bound to make the investment at the direction of the tenant for life, unless they are satisfied that that direction has been given upon a proper investigation of the title and a proper report as to the value of the proposed security; *Re Hotham*, 1902, 2 Ch. 575.

(*s*) Sect. 54, also extending, in favour of a person dealing in good faith with the tenant for life, to the case of an exchange, partition, lease, mortgage or charge.

(*t*) See *Sutherland* v. *Sutherland*, 1893, 3 Ch. 169; *Chandler* v. *Bradley*, 1897, 1 Ch. 315; *Re Handman and Wilcox's Contract*, 1902, 1 Ch. 599.

(*u*) *Chandler* v. *Bradley*, ubi sup.

would not appear, as a rule, to avoid the contract; for the vendor's general costs of the sale are not payable out of his own pocket, but are properly discharged out of the purchase money or otherwise out of the capital of the settled property (*x*). But the case is different if the purchaser agree to pay any costs which ought properly to be borne by the vendor himself, such as the costs of obtaining the concurrence of mortgagees of the vendor's life estate (*y*). In this case the tenant for life would be stipulating for an advantage to himself at the expense of the remainderman, as the purchase money is obviously decreased by the amount of costs payable by the vendor personally which the purchaser contracts to discharge; and the sale would appear to be void. As we have seen (*z*), where the purchaser has notice of some non-compliance with the conditions of the Acts other than those which forbid the tenant for life to profit at the remainderman's expense, it does not appear that he can rely on the protection given by the enactment last quoted. It should be noted that this enactment only gives relief to a purchaser or other person dealing with the tenant for life, and does not validate, in favour of a subsequent purchaser, an infirm title acquired from the tenant for life by a purchaser or lessee, who had notice of some fact, which made void the attempted exercise of the statutory power (*a*). And further, it appears that on a purported exercise by a tenant for life of some power given to him by the Settled Land Acts if the tenant for life do not comply in all respects with the conditions prescribed by the Acts, any conveyance thereby made is altogether void and not merely voidable, and does not pass the legal estate in the land (*b*); save only when

(*x*) See *Re Smith's Settled Estates*, 1891, 3 Ch. 65; *Smith* v. *Lancaster*, 1894, 3 Ch. 439.

(*y*) See *Cardigan* v. *Curzon-Howe*, 41 Ch. D. 375.

(*z*) Above, p. 309.

(*a*) *Re Handman and Wilcox's Contract*, 1902, 1 Ch. 599.

(*b*) In *Re Handman and Wilcox's Contract*, 1902, 1 Ch. 599, it was

the purchaser, lessee or other person dealing in good faith with the tenant for life is assisted by the enactment under discussion.

The statutory powers incapable of assignment or release.

As we have seen (*c*), the powers given to a tenant for life by the Settled Land Acts are not capable of assignment or release, do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exercisable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement; and a contract by a tenant for life not to exercise any of these powers is void. But this enactment shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and such assignee's rights shall not, as a rule, be affected without his consent (*d*).

Bankruptcy of tenant for life.

It appears from this that on the bankruptcy of a tenant for life his statutory powers do not pass to his trustee in bankruptcy, but remain exercisable by him; and it is thought that the trustee cannot be said to be an assignee for value of the bankrupt's estate. But it should be noted that the trustee has power to sell the bankrupt's estate, and a purchaser from the trustee would be an assignee for value of the bankrupt's estate; so that after the bankruptcy of a tenant for life it would scarcely be safe to accept a title from him under an exercise of his statutory power of sale without the concurrence of the trustee to declare that he has made no assignment for value and to covenant against incumbrances. It has been held, that if a tenant for life

Release of an

treated as an open question whether a lease granted under the Acts by a tenant for life to one who knew that the best rent was not reserved was void or voidable: but it is submitted that this view was mistaken, the rule as to the execution of statutory as well as express powers being that, in default of compliance with the terms of a power, any purported exercise thereof is void; see above, pp. 302, 307.

(*c*) Above, p. 324.

(*d*) Stat. 45 & 46 Vict. c. 38, s. 50.

undivided share.

assign or release an undivided share of the land he holds to the remainderman, so as to effect a merger of the life estate therein, he nevertheless retains his statutory power of sale over the entirety of the land (*e*). But it does not appear that the tenant for life would retain his statutory powers after the release by him to the remainderman of his life estate in the whole of the settled land, for then the settlement would be brought to an end (*f*); and it is submitted that this reasoning is equally applicable in the case of a release made by the tenant for life to the remainderman of a definite portion of the settled land in order that the same may be taken out of settlement and enjoyed by the remainderman in possession as his own absolute property.

Title depending on the exercise of a mortgagee's power of sale.

Where the title depends on the exercise by a mortgagee of a power of sale contained or implied in the mortgage deed, the purchaser's counsel must satisfy himself that the power of sale has become so exercisable that a purchaser thereunder will obtain the estate assured free from all equity of redemption or right to set aside the sale. Under the conveyancing practice prior to the year 1882, when powers of sale were usually conferred by the express terms of mortgage deeds, the common form was first to give the mortgagee a general authority to sell at any time after the payment of the principal money secured had become due (*g*), and then to provide, particularly, that the power of sale should not be executed unless and until default should have been made in payment of the money secured at the appointed time, and the mortgagee should have given notice to pay off, and default should have been made in payment for a specified time (*h*) after such notice, or

(*e*) *Re Barlow's Contract*, 1903, 1 Ch. 382.

(*f*) See *Re Mundy and Roper's Contract*, 1899, 1 Ch. 275, 296, 297. See Addendum Vol 2

(*g*) Usually six months after the date of the mortgage.

(*h*) Usually six months.

unless or until some interest should have fallen into arrear for a given period (*i*). But in every well-drawn mortgage deed an elaborate clause was inserted exonerating a purchaser from the necessity of seeing or inquiring whether any of the particular cases had arisen in which a sale was authorised, and protecting him against any impropriety or irregularity in the sale (*k*). On a sale by a mortgagee under an express power of sale containing a clause for the purchaser's protection in the common form, the purchaser should, of course, abstain from making requisitions as to any matter on which he is exonerated from the duty of inquiry; for if through his own inquiries or otherwise he obtain notice of some irregularity in the sale, he must have regard thereto, and will no longer be protected (*l*). He must see, however, that sufficient time has elapsed since the date of the mortgage deed for the power of sale to become properly exercisable (*m*); but if this appear to

(*i*) Usually three months.

(*k*) Davidson, Prec. Conv. vol. ii. pt. ii. 66 *sq.*, 79, 308—310, 4th ed. The form there given provides that, upon any sale purporting to be made in pursuance of the mortgagee's power of sale, the purchaser shall not be bound to see or inquire whether any of the particular cases has happened, in which a sale is authorised, *or whether default has been made in payment of any principal or interest secured by the mortgage deed at the time appointed for payment thereof, or whether any money remains on the security of the mortgage deed*, or as to the necessity or expediency of the stipulations subject to which the sale shall have been made, or otherwise as to the propriety or regularity of the sale; and that, notwithstanding any impropriety or irregularity whatsoever in the sale, the same shall, as regards the safety and protection of the purchaser, be deemed to be within the power and be valid and effectual accordingly, and the remedy of the mortgagor in respect of any breach of the provisions of the mortgage deed conferring the power of sale or any impropriety or irregularity whatsoever in the sale shall be in damages only. Where a mortgage deed contained a similar clause, omitting the words in italics, it was held that a purchaser buying in good faith on a sale purporting to be made in exercise of the mortgagee's power of sale was not bound to inquire whether any money remained owing upon the security of the mortgage deed, and would be protected if the money secured had been paid off at the time of the sale; *Dicker* v. *Angerstein*, 3 Ch. D. 600.

(*l*) *Parkinson* v. *Hanbury*, 1 Dr. & Sm. 143; *Selwyn* v. *Garfit*, 38 Ch. D. 273.

(*m*) *Selwyn* v. *Garfit*, 38 Ch. D. 273, where mortgage money was made payable and a power of

be the case, he need make no further inquiry (*n*). If a power of sale expressly given by a mortgage deed contain no clause for the purchaser's protection, he must ascertain not only that the event has occurred in which the power was made exercisable, but also that the mortgage is still subsisting (*o*). The power of sale incorporated by the Conveyancing Act of 1881 in mortgage deeds made after that year (*p*), and since generally relied on in practice, gives to the mortgagee a power of sale when the mortgage money has become due, but provides (*q*) that he shall not exercise such power unless and until (1) notice requiring payment of the mortgage money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the mortgage money or of part thereof for three months after such service; or (2) some interest under the mortgage is in arrear and unpaid for two months after becoming due; or (3) there has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor or of some person concurring in making the mortgage to be observed or performed, other than and besides a

Title under the statutory power of sale.

sale given six months after the date of the mortgage deed; but it was provided that the mortgagee should not execute the power of sale unless and until default should have been made in payment at the time appointed of some principal money or interest secured, *and* the mortgagee should have given notice to pay off, *and* default should have been made in payment for three months after such notice; and it was held that a purchaser from the mortgagee purporting to exercise his power of sale seven months after the date of the mortgage deed had notice *ipso facto* that the sale was irregular; for the power could not possibly have become exercisable until three months had expired *after* the mortgage money had become payable, that is, until nine months after the date of the mortgage deed. The sale was therefore set aside on the mortgagor's application, the Court being of opinion that the purchaser was not relieved by a clause for his protection in common form, even though it exonerated him from the necessity of inquiring whether default had been made in payment of the money secured at the time appointed.

(*n*) See note (*k*), above.

(*o*) *Re Edwards to Green*, 58 L. T. N. S. 789.

(*p*) Stat. 44 & 45 Vict. c. 41, ss. 1, 19.

(*q*) Sect. 20.

covenant for payment of the mortgage money or interest thereon. This follows the old conveyancing form, except that the power is made exercisable at an earlier period (*r*); but the clause for the purchaser's protection contained in the Act (*s*) is not the same as that usually inserted in mortgage deeds under the old practice (*t*). The Act gives no protection to a purchaser until he has obtained a conveyance from the mortgagee in professed exercise of the statutory power of sale; and it does not expressly exempt the purchaser from the duty of inquiring, before conveyance, whether the sale has been properly made. If, therefore, the purchaser make inquiry, before accepting the title, whether any case has arisen to authorise the exercise of the power of sale, the mortgagee will be bound to answer (*u*). But if the purchaser, buying in good faith, refrain from making any such inquiry, he will be protected against any irregularity on obtaining a conveyance. It appears, therefore, that he should, as a rule, abstain from making such inquiries (*x*), and need only satisfy himself that sufficient time has elapsed for the power to have become properly exercisable (*y*). Where a mortgage deed is executed in the usual form, providing for repayment of the money advanced, with interest, six months after the date of the deed (*z*), the earliest time at which the statutory power of sale can become exercisable is eight months after the date of the deed by the interest being

(*r*) Above, p. 338.

(*s*) Sect. 21 (2), providing that where a conveyance is made in professed exercise of the power of sale conferred by this Act the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(*t*) Above, p. 339, and n. (*k*).

(*u*) *Life Interest, &c. Corpn.* v. *Hand in Hand, &c. Soey.*, 1898, 2 Ch. 230.

(*x*) *S. C.*, 1898, 2 Ch. 238; *Bailey* v. *Barnes*, 1894, 1 Ch. 25.

(*y*) Above, p. 339; *Re Thompson and Holt*, 44 Ch. D. 492, 499.

(*z*) Wms. Real Prop. 532, 610, 19th ed.

Waiver of any particular restriction on the exercise of a mortgagee's power of sale.

two months in arrear. It appears, however, that at any time after a mortgagee's power of sale has become generally exercisable—that is, after the mortgage money has become due (*a*)—the mortgagor or his successors in estate may waive compliance with any particular restriction imposed on the exercise of the power; and in such case the mortgagee can make a good title on an exercise of the powers of sale (*b*). But such waiver, to be effectual, must be given by all persons interested in the equity of redemption; thus, if the mortgagor have made a second mortgage, his waiver alone is insufficient (*c*). And where a mortgagee, selling under his power of sale, asserts that he can make a good title by means of such waiver, the purchaser is entitled and ought to require him to prove that the alleged waiver has been given by all persons interested in the equity of redemption, and at his own expense to procure all such persons to concur in the conveyance in order to confirm the sale.

Mortgagor's concurrence cannot be required.

What estate the mortgagee can convey.

As a rule, however, the purchaser from a mortgagee selling under his power of sale is not entitled to require the mortgagor's concurrence; that is, supposing the power to have become properly exercisable (*d*). Where the power of sale is express, the mortgagee can convey to the purchaser such estate as by the joint operation of the mortgage and the power he has been effectually authorised to convey free from equity of redemption; but if this do not comprise the entire fee simple or other estate sold, the purchaser is, of course, entitled to object to the title, and may require the concurrence of all other necessary parties (*e*). A mortgagee selling

(*a*) Above, p. 340.

(*b*) *Re Thompson and Holt*, 44 Ch. D. 492.

(*c*) *Selwyn* v. *Garfit*, 38 Ch. D. 273.

(*d*) *Clay* v. *Sharpe*, 18 Ves. 346, n.; *Corder* v. *Morgan*, ibid. 344; Sug. V. & P. 396, 14th ed.

(*e*) See above, pp. 130—132.

under the power of sale given by the Conveyancing Act of 1881 is enabled to convey the property sold by deed for such estate and interest therein as is the subject of the mortgage (*f*). This does not empower a mortgagee who has acquired an equitable interest only in the property mortgaged to convey the legal estate therein on an exercise of the statutory power of sale (*g*), or a mortgagee of leaseholds by way of underlease to convey the original term (*h*). The Act provides (*f*) that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed exercising the mortgagee's power of conveyance thereby conferred, unless the deed is otherwise sufficient in that behalf in law or by custom. When, therefore, a mortgage of copyholds has been made in the form now usual, by a deed of covenant to surrender incorporating the statutory power of sale, followed by a conditional surrender to the use of the mortgagee (*i*), and the mortgagee has sold the legal interest under his power of sale, he must, in order to confer upon the purchaser the legal title to be admitted tenant on the court rolls (*k*), either procure the mortgagor to surrender to the purchaser's use, or himself be admitted and then execute a like surrender (*l*). The same course is necessary when a mortgagee of copyholds sells under an express power of sale (*l*).

Copyholds.

The power of sale given to mortgagees by Lord Cranworth's Act (*m*) may have been or may be well exercised after the year 1881, notwithstanding the

Title under the power of sale given to mortgagees by Lord

(*f*) Stat. 44 & 45 Vict. c. 41, s. 21 (1).

(*g*) *Re Hodson and Howes' Contract*, 35 Ch. D. 668.

(*h*) See *Re Deighton and Harris' Contract*, 1898, 1 Ch. 458; above, p. 148, and n. (*e*).

(*i*) Wms. Real Prop. 546—548, 19th ed.; Davidson, Prec. Conv. vol. ii. pt. ii. 113 *sq.*, 4th ed.; 2 Key & Elphinstone, Prec. Conv. 79—82, 4th ed.

(*k*) See above, p. 129.

(*l*) Davidson, Prec. Conv. vol. ii. pt. i. 407—411, and pt. ii. 116, 4th ed.; and see *Hall* v. *Bromley*, 35 Ch. D. 642.

(*m*) Stat. 23 & 24 Vict. c. 145, ss. 11—24, 34.

Cranworth's Act.

repeal of the provisions of that Act by the Conveyancing Act of 1881 (*n*). The former Act affords the like protection to purchasers when a sale has been effected in professed exercise of the powers thereby conferred (*o*) as the latter statute gives when a conveyance has been made in professed exercise of the power of sale which it provided (*p*). Lord Cranworth's Act (*q*), however, empowered a mortgagee exercising the power of sale thereby conferred to convey or vest the property sold to or in the purchaser for all the estate and interest therein which the *mortgagor* had power to dispose of, and so enabled a mortgagee of leaseholds by demise to convey the original term (*r*), and a mortgagee who had obtained an equitable charge only on freeholds to assure the legal estate therein (*s*). The Act provides, however, that in the case of copyholds, the beneficial interest only shall be conveyed to and vested in the purchaser by a mortgagee selling thereunder; so that if the mortgagee sell the legal interest he must obtain for the purchaser the legal right to be admitted tenant on the rolls by procuring a surrender to be made to his use in the usual way (*t*).

Conveyance by mortgagee selling under Lord Cranworth's Act.

Mortgagee selling under power of sale bound only to act in good faith.

A mortgagee, in exercising his power of sale, does not stand in a fiduciary relation to his mortgagor (*u*). His only obligations are to observe the terms of the power and to act in good faith (*v*). He is bound to sell fairly, and to take reasonable steps to obtain a

(*n*) Stat. 44 & 45 Vict. c. 41, s. 71; *Re Solomon and Meagher's Contract*, 40 Ch. D. 508; and see Williams's Conveyancing Statutes, 251—253.

(*o*) Stat. 23 & 24 Vict. c. 145, s. 13.

(*p*) Above, p. 341, and n. (*s*). Note the difference in the language.

(*q*) Sect. 15.

(*r*) *Hiatt* v. *Hillman*, 19 W. R. 694.

(*s*) *Re Solomon and Meagher's Contract*, 40 Ch. D. 508.

(*t*) Above, p. 343.

(*u*) *Warner* v. *Jacob*, 20 Ch. D. 220.

(*v*) *Kennedy* v. *De Trafford*, 1896, 1 Ch. 762; 1897, A. C. 180; *Nutt* v. *Easton*, 1899, 1 Ch. 873; 1900, 1 Ch. 29.

proper price; and for this reason and because his authority is to *sell* and not to make himself full owner of the mortgaged property, he cannot sell to himself or to a trustee or an agent for himself, or rightly pursue any scheme for getting the property into his own hands under the guise of sale (*x*); but he may proceed to a forced sale for the purpose of paying the mortgage debt (*y*). He need not sell by auction, unless of course he should have been specially restricted to this mode of sale by the terms of his power (*z*). For example, the Court has upheld a sale by a mortgagee to one of two mortgagors, who were tenants in common, for the exact amount owing for principal, interest and costs, the bulk of the purchase money being allowed to remain on mortgage, when it appeared that the mortgagee had acted in perfect good faith, having refrained from putting the property up to auction on a surveyor's advice that it would be unlikely to realise the amount owing, and having advertised in vain for another purchaser by private contract (*a*). On the other hand, a sale by the transferee of a mortgage, immediately after the transfer, for the exact sum paid for principal and interest on taking the transfer, was set aside, as between the parties to this sale and the persons entitled to the equity of redemption, when it was shown that the transferee of the mortgage had been a mere nominee of the purchaser and there had been no *bonâ fide* exercise of the power of sale. The purchaser, however, having mortgaged the property and resold the equity of redemption prior to the commencement of the proceedings to set aside the sale to her, and the purchaser

(*x*) *Downes* v. *Grazebrook*, 3 Mer. 200; *Robertson* v. *Norris*, 1 Giff. 421, 4 Jur. N. S. 155, 443; *National Bank of Australasia* v. *United, &c. Co.*, 4 App. Cas. 391; *Martinson* v. *Clowes*, 21 Ch. D. 857, aff. 1885, W. N. 41; *Hodson* v. *Deans*, 1903, W. N. 130.

(*y*) *Farrar* v. *Farrars, Ltd.*, 40 Ch. D. 395, 398; *Bailey* v. *Barnes*, 1894, 1 Ch. 25, 32.

(*z*) *Kennedy* v. *De Trafford*, 1896, 1 Ch. 762, 767; 1897, A. C. 180, 185.

(*a*) *Kennedy* v. *De Trafford*, ubi sup.

of the equity of redemption having taken a transfer of this mortgage after he had notice of such proceedings, and having proved that he had no notice at the time of his purchase of the equity of redemption of the circumstances attending the prior sale, it was held that he was not affected with constructive notice of these circumstances or of any imperfection in the prior sale, owing to the facts apparent on the face of the title or by reason of his omission to make inquiry as to the validity of the prior sale; and it was decided that he was entitled to tack the equity of redemption which he had purchased to the legal estate acquired by him under the transfer of the mortgage, and so exclude the equity of the persons originally entitled to redeem to set aside the prior sale (*b*). A mortgagee may well exercise his power of sale, notwithstanding that he has been in possession of the mortgaged property for a length of time sufficient to bar the mortgagor's equity of redemption under the Statutes of Limitation; and this is also the case where the mortgage has been made, not in the form now usual of a conveyance with power of sale, but in the form of a conveyance on trust for sale (*c*). It appears too that a mortgagee may well exercise his power of sale after he has obtained an order for foreclosure absolute (*d*); and his right to exercise this power is not affected by the mere commencement of proceedings either by himself to obtain foreclosure, or by the mortgagor for redemption (*e*). But when the mortgagee has obtained an order for foreclosure *nisi*, giving the mortgagor the usual time within which to redeem, or the mortgagor has obtained the common order for redemption (*f*), the mortgagee may not exercise his

Sale by mortgagee in possession after mortgagor's title barred.

Sale after foreclosure absolute.

Sale pending foreclosure or redemption proceedings.

(*b*) *Bailey* v. *Barnes*, 1894, 1 Ch. 25.

(*c*) See *Locking* v. *Parker*, L. R. 8 Ch. 30; *Re Alison*, 11 Ch. D. 284, 290, 295.

(*d*) See *Stevens* v. *Theatres, Ltd.*, 1903, 1 Ch. 857, 862, 863.

(*e*) *Adams* v. *Scott*, 7 W. R. 213; *Stevens* v. *Theatres, Ltd.*, 1903, 1 Ch. 857, 861.

(*f*) See 3 Seton on Judgments, 1895, 1926, 6th ed.

power of sale without leave of the Court, so long as the right of redemption so reserved to the mortgagor remains open. The power is, however, not destroyed but merely suspended during this period, and if the mortgagee do exercise it within that time in favour of a purchaser taking without notice of the order, it appears that the latter will get a good title (*g*). But if the purchaser have express notice of any foreclosure or redemption proceedings or any such proceedings be registered as a *lis pendens*, the purchaser will be bound by them and must see that no order suspending in effect the exercise of the mortgagee's power of sale has been made or is still subsisting (*h*).

Purchase of foreclosed property.

When property is purchased, to which a mortgagee has become entitled under a decree of foreclosure absolute (*i*), care must be taken to ascertain that there were not any circumstances, attending the making of the order, which would induce the Court to re-open the foreclosure (*j*).

(*g*) *Stevens* v. *Theatres, Ltd.*, 1903, 1 Ch. 857.

(*h*) See below, Chap. XII., § 2.

(*i*) Wms. Real Prop. 540, 19th ed.

(*j*) See *Campbell* v. *Holyland*, 7 Ch. D. 166; 1 Dart, V. & P. 468.

CHAPTER X.

OF PARTICULAR TITLES.

§ 1. Sale of Copyholds.
§ 2. Sale of Leaseholds.
§ 3. Sale of lands in a Register County or Compulsory Registration District.
§ 4. Voluntary Conveyances.
§ 5. Sale of Ground Rents, Reversions and Remainders.
§ 6. Sale of purely Incorporeal Hereditaments.
§ 7. Sale of Charity Lands.
§ 8. Sale of Partnership Property.
§ 9. Sale by Order of the Court.
§ 10. Sale of an Equity of Redemption.
§ 11. Sale of Licensed Property.
§ 12. Land subject to Restrictive Covenants.
§ 13. Investigation of Title in view of a Mortgage.

---

§ 1.—*Sale of Copyholds.*

Copyholds.

On the sale of copyholds, the purchaser, in the absence of special stipulation, is equally entitled to have the whole legal and equitable estate vested in him as in the case of freeholds (*a*). In copyholds, however, what comes under the head of the legal estate is the tenancy of the lands sold on the court rolls of the manor of which they are held, for the customary estate comprised in the contract for sale; and what the vendor has to prove is that he can confer this right. He will have

(*a*) Above, p. 129; *Re Wilson's and Stevens's Contract*, 1894, 3 Ch. 546, 549.

discharged his obligation if he show either that he is himself the tenant on the rolls of such an estate, and so can surrender the same to the purchaser's use, or that he can, by the exercise of a power of appointment, give the purchaser a direct right to be admitted of such an estate, or that some other person is such a tenant, and that he (the vendor) is entitled to call upon that tenant to surrender to the use of the purchaser (*b*). It must be borne in mind, however, that if there is no tenant upon the rolls, and the vendor cannot by appointment give the purchaser a direct right to be admitted, the vendor must, at his own expense, procure a tenant to be admitted who shall be able to execute the necessary surrender to the purchaser. And for this purpose the vendor must himself pay all fines due to the lord in consequence of such admittance (*c*). For example, if A., a tenant of copyholds in customary fee, devise them to B. and C. on trust for sale, and these devisees after A.'s death sell them to D., B. and C. cannot at once give D. the right to be admitted, but must themselves first be admitted tenants on the rolls; after which they will be enabled to execute such a surrender to D.'s use as will give him the legal right to be admitted. But if A.'s will had contained a power (as distinct from a trust) for B. and C. to sell his copyholds, or if A. had devised his copyholds to such uses as B. and C. should appoint for the purpose of giving effect to any sale made by them under the trust declared in that behalf, then, if B. and C. were to sell to D. before the lord had seized *quousque* for want of a tenant, D. would be entitled to claim admittance directly as being in fact the person entitled under A.'s will (*d*). It must be

(*b*) Above, pp. 130—132.

(*c*) See *Bradley* v. *Munton*, 16 Beav. 294; *Paramore* v. *Greenslade*, 1 Sm. & Giff. 541; *Whiteley* v. *Taylor*, 35 L. T. N. S. 187.

(*d*) *Glass* v. *Richardson*, 9 Hare, 698, 2 De G. M. & G. 658; *R.* v. *Wilson*, 3 B. & S. 201; Sug. V. & P. 562; Wms. Real Prop. 481, 19th ed.

remembered that the lord is entitled to exact the fine due by the custom on every change in the tenancy of lands held of him by copy of court roll. Thus, if A., tenant of copyholds in customary fee, die intestate leaving B. his heir, and B. die intestate without having been admitted and leaving C. his heir, and then C. sell the land to D., C. must, as we have seen, procure himself to be admitted in order to give to D. the title promised by the contract. But in order to procure his admittance, C. will have to pay a double fine, namely, that due on the devolution of the estate from A. to B. as well as that payable on his own admission as B.'s heir (*e*). The lord is not, however, entitled to any fine by reason of the devolution of any equitable estate or interest in lands holden of him by copy; he is only concerned with the changes in the legal tenancy upon the court rolls (*f*). So that if A., tenant of copyholds, sell them to B. and surrender to B.'s use, and B., without being admitted, sell the lands to C., and C., remaining unadmitted, sell to D., there is no need for either B. or C. to be admitted in order to complete C.'s contract with D., but C. can call upon A., who has remained the tenant upon the rolls, to surrender to D.'s use, and upon the execution of such surrender D. will be entitled to be admitted on payment of a single fine. If A. had died, his heir or devisee (*g*) would have to be admitted at C.'s expense in order to surrender to D.; but the only fine payable by C. would be that incurred by the admission of A.'s heir or devisee (*h*).

(*e*) *Morse* v. *Faulkner*, 1 Anst. 11, 13; *Morris* v. *Clarkson*, 3 Swanst. 558, 563, 566; Watson, B., *Garland* v. *Alston*, 3 H. & N. 390, 393, 395; *Londesborough* v. *Foster*, 3 B. & S. 805; 1 Scriv. Cop. 383, 405, 3rd ed.

(*f*) *Hall* v. *Bromley*, 35 Ch. D. 642.

(*g*) See above, pp. 177, 178, 182, 183.

(*h*) 1 Scriv. Cop. 404, 3rd ed.; *Garland* v. *Alston*, 3 H. & N. 393; *Hall* v. *Bromley*, ubi sup.

§ 2.—*Sale of Leaseholds.*

Leaseholds.

The principal duties of a conveyancer advising a purchaser of leasehold land have been already noticed (*i*). He must see that the lease or term offered by the abstract corresponds at all points with that offered by the contract. The purchaser is entitled to require the assignment to him of a lease from the freeholder unless the contract distinctly specified an underlease as the subject of the sale (*k*). And it is now settled that, notwithstanding the general rule that notice of a document is notice of its contents (*l*), a purchaser of leasehold land is entitled to object to the title if the covenants contained in the lease are more onerous or stringent than those usually inserted in leases of like character to that purchased, unless the existence of such covenants were brought to his notice at the time of entering into the contract, either through express mention therein or through his having been afforded an opportunity of inspecting the contents of the lease (*m*). So we have seen that the existence of a considerable ground rent not mentioned in the particulars on the sale of houses held for a long term of years may be an objection to the title (*n*). A stipulation is frequently made on the sale of leaseholds by auction that the lease will be produced at the sale and may be inspected at the office of the vendor's solicitors at any time within a week previously to the sale, and that any purchaser shall be deemed to have full notice of the contents of the lease, whether he avail himself of the opportunity of inspection

(*i*) Above, pp. 81, 82 and n. (*d*), 129, 130, 142.

(*k*) Above, p. 81, n. (*d*).

(*l*) Above, p. 256.

(*m*) *Reeve* v. *Berridge*, 20 Q. B. D. 523; *Midgley* v. *Smith*, 1893, W. N. 120; *Re White and Smith's Contract*, 1896, 1 Ch. 637; *Molyneux* v. *Hawtrey*, 1903, 2 K. B. 487; see also *Nouaille* v. *Flight*, 7 Beav. 521; *Re Davis to Cavey*, 40 Ch. D. 601; above, p. 166. This is so even though the contract provide that the vendor's title shall be accepted: *Re Haedicke and Lipski's Contract*, 1901, 2 Ch. 666.

(*n*) Above, pp. 141, 142.

or not (*o*). A purchaser of leaseholds buying under such a stipulation as this cannot, of course, object to anything contained in the lease (*p*); unless, indeed, an actual misrepresentation has been made by the vendor, in the particulars of sale or otherwise, as to the contents of the lease (*q*).

Evidence that a lease held subject to a condition of re-entry has not determined.

When the property purchased is held for a term of years determinable by re-entry for non-payment of rent or breach of covenant (*r*), it is, of course, important to ascertain that no cause of forfeiture under the condition of re-entry has occurred. Before the year 1882, the purchaser in such a case was entitled, in the absence of stipulation to the contrary, to require evidence that all the covenants and conditions in the lease had been duly performed and observed up to the date of the actual completion of the contract (*s*). It was, however, usually stipulated that production of the receipt for the last payment of rent due before the completion of the sale should be conclusive evidence of this (*t*). At the present time, the purchaser's rights in this respect are regulated, in the absence of special stipulation, by the following provision of the Conveyancing Act of 1881 (*u*):—Where land sold is held by lease (not including underlease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been

(*o*) 1 Key & Elph. Prec. Conv. 270, 4th ed.

(*p*) See *Lawrie* v. *Lees*, 14 Ch. D. 249, 252, 257.

(*q*) See *Van* v. *Corpe*, 3 My. & K. 269; *Flight* v. *Barton*, ib. 282; above, p. 160.

(*r*) Wms. Real Prop. 327, 499, 19th ed.

(*s*) 1 Davidson, Prec. Conv. 536, 4th ed.; *Palmer* v. *Goren*, 25 L. J. Ch. 841.

(*t*) 1 Davidson, Prec. Conv. 537, 624, 648 and n. (*y*), 4th ed.

(*u*) Stat. 44 & 45 Vict. c. 41, s. 3 (4).

duly performed and observed up to the date of actual completion of the purchase. This provision is less stringent than the special stipulation previously usual, which was construed as obliging the purchaser to accept the title, notwithstanding the existence of a continuing breach of the covenants in the lease (*x*). The stipulation contained in the Act only binds the purchaser to assume, unless the contrary shall appear, that the covenants have been performed, and does not preclude him from objecting to the title on the ground that a cause of forfeiture has occurred, if it appear that a breach of covenant has in fact been committed and has not been waived (*y*).

Waiver of forfeiture by receipt of rent.

Receipt of rent by a landlord is a waiver of forfeiture for breaches of covenant which have occurred and been brought to his notice before the rent became due (*z*): but it is not a waiver on account of breaches of which he had no notice (*a*), or subsequent breaches (*b*). Production of a receipt for rent is not, therefore, in itself complete evidence of any waiver of a breach of covenant. But a purchaser buying under the present statutory stipulation must, on production of the last receipt for rent in accordance therewith, assume (unless the contrary appear) that the covenants have been duly performed, not only prior to the receipt of rent, but up to the date of actual completion of the purchase. It has been decided that the statutory stipulation does not apply where the land sold is held under a lease for years at a peppercorn rent, or indeed at any other rent in kind and not in money; in which case the purchaser has the same right to require strict evidence of the

(*x*) See *Bull* v. *Hutchens*, 32 Beav. 615; *Lawrie* v. *Lees*, 14 Ch. D. 249; 7 App. Cas. 19, 30—33, 37—39, 42.

(*y*) *Re Highett and Bird's Contract*, 1902, 2 Ch. 214; 1903, 1 Ch. 287.

(*z*) *Bridges* v. *Longman*, 24 Beav. 27, 30; *Davenport* v. *The Queen*, 3 App. Cas. 115; *Jacob* v. *Down*, 1900, 2 Ch. 156.

(*a*) *Pennant's Case*, 3 Rep. 64; *Ewart* v. *Fryer*, 1901, 1 Ch. 499, 502, 511.

(*b*) See *Marsh* v. *Curteys*, Cro. Eliz. 528; 3 Rep. 65 a; *Price* v. *Worwood*, 4 H. & N. 512.

performance of the lessee's covenants as in the case of an open contract made before the year 1882 (*c*).

Purchaser buying leaseholds with notice of a breach of covenant that cannot or will not be remedied.

As we have seen (*d*), if a man buy land with notice, either oral or written but not contained in the contract for sale, that a good title cannot or will not be made, the vendor is exonerated from showing title to the extent indicated by the notice, unless he should have *expressly* agreed by the contract for sale to show a good title. It follows, therefore, that if one buy leasehold land with notice so given to him that there has been a breach of covenant, which cannot or will not be remedied by the vendor, he is precluded, unless the contract contain an *express* stipulation that the vendor shall show a good title, from requiring the evidence, to which he would otherwise be entitled, that the covenant in question has been duly performed. Thus, where houses held under a repairing lease are obviously dilapidated and the purchaser agrees, outside of the written contract, to take them as they are, it is thought that he could not insist on the vendor furnishing evidence of his performance of the covenant to repair. The rule in question, though perfectly well established, was, however, unaccountably overlooked both by the vendor's counsel, by Swinfen Eady, J., and by the Court of Appeal in the case of *Re Highett and Bird's Contract* (*e*). In that case the purchaser bought under an open contract a leasehold house, which was obviously out of repair, and *the vendor accepted a reduced price in consequence.* Before the title was accepted, the vendor was served with a

Re Highett and Bird's Contract.

(*c*) *Re Moody and Yates' Contract*, 28 Ch. D. 661; 30 Ch. D. 344. In this case there was a covenant to finish a house within six months to the satisfaction of the lessor's surveyor, and it was held that the surveyor's certificate to this effect was a part of the vendor's title, and that the expense of procuring the same was therefore not payable by the purchaser under sect. 3 (6) of the Conveyancing Act of 1881; see above, pp. 28, 86, 99, 108.

(*d*) Above, p. 164.

(*e*) 1902, 2 Ch. 214; 1903, 1 Ch. 287.

"dangerous structure" notice from the London County Council under the London Building Acts, 1894 and 1898, requiring him to pull down or render secure a part of the house. The notice not being complied with, a police court order was made requiring him to do the repairs within fourteen days. This order was made before, but not served on the vendor till after the acceptance of the title. The vendor, who had produced the receipt for the last quarter's rent (*f*), took out a vendor and purchaser summons for a declaration that he had shown a good title, and that the expense of complying with the police court order was an outgoing (*g*) which ought to be borne by the purchaser. The vendor's counsel mainly contended that this expense had not ripened into a charge or liability until after the proper time for completion (*g*), and that under the Conveyancing Act, 1881 (*h*), production of the last receipt was conclusive evidence of performance of the covenant to repair. It was held (and in this respect, no doubt, rightly) that under the statutory stipulation such production is only evidence *primâ facie* of performance of the covenant, and that the purchaser is not obliged to accept it as conclusive where he has notice of a breach of the covenant. It was, however, decided in both Courts that the vendor was under an obligation to prove that the covenant to repair had been performed, and was *for this reason* bound to defray the expense of complying with the notice and order; and the Courts declined to consider at what time this liability became a charge. But it is submitted that this decision cannot be supported on the ground so assigned for it. The Courts rested their judgment on the supposed authority of the case of *Barnett* v. *Wheeler* (*i*). That case, however, was an action of

(*f*) Above, p. 352.
(*g*) See above, p. 41, and below, Chap. XI.
(*h*) Above, p. 352.
(*i*) 7 M. & W. 364.

assumpsit by a purchaser, in which the declaration stated a sale of leaseholds on the express condition that the vendor should make a good title, and was argued on demurrer to a plea that the vendor made a good title in all respects except as to compliance with a covenant to repair, and that the purchaser knew that the property sold was out of repair. It was considered that the plea was bad, but Parke, B., particularly mentioned that there was an express contract to make a good title. This accords with the rule stated above (*k*). As already mentioned, this rule was not brought to the notice of either Court in *Re Highett and Bird's Contract*, nor were any of the authorities cited by which it is established. No doubt under an open contract for the sale of leaseholds, without more, the vendor is bound to prove that there is no liability to forfeiture by reason of the non-performance of a covenant to repair (*l*); and this may be the case notwithstanding that the property is obviously out of repair, for it may be contemplated that the vendor shall perform the covenant before completion (*m*). But where a vendor is induced to accept a lower price than he would otherwise take on account of the property being out of repair, it is submitted that the parties plainly intend to waive all objection to the title caused by the non-performance of a covenant to repair, and must be taken to have contracted on that footing. In consequence, however, of the decision here criticised, a vendor selling houses held under a repairing lease should be most careful to stipulate expressly in the contract for sale that the purchaser shall be deemed to have notice of the actual state and condition of the property, and shall take the houses as they are; and a vendor of leaseholds should always employ an express stipulation, such as was generally used before the Con-

(*k*) Pp. 164, 354. (*l*) Above, p. 352.
(*m*) See 7 M. & W. 366, 367.

veyancing Act, making production of the last receipt for rent *conclusive* evidence of the performance of all covenants (*n*).

Sale of land held by underlease.

Where land held by underlease is sold as such, the purchaser cannot of course reject the title because he is not getting a term granted by a lease from the freeholder; but he has the same right as the purchaser of such a lease to object to the title on the ground of liability to unusually onerous covenants not brought to his notice at the time of sale (*o*). Where the underlease sold and the superior lease are both determinable by re-entry for non-payment of rent and breach of covenant, it is of course material to the title to show that no cause of forfeiture of either has occurred. Under the Conveyancing Act of 1881 (*p*), a provision similar to that considered above is implied, in the absence of stipulation to the contrary, in contracts made after the year 1882 for the sale of land held by underlease; the purchaser being bound to assume, unless the contrary appears, on production of the receipt for the last payment due for rent under the underlease before the date of actual completion of the purchase, that all the covenants and provisions of the underlease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date. It has been held that the vendor of an underlease does not comply with this provision by producing a receipt given by the superior landlord for rent paid to him by the vendor under threat of distress; what is required is the receipt for the rent due under the underlease (*q*).

(*n*) Above, pp. 352, 353.

(*o*) Above, p. 351, and cases cited in n. (*m*) thereto; *Hyde* v. *Warden*, 3 Ex. D. 72.

(*p*) Stat. 44 & 45 Vict. c. 41, s. 3 (5, 9, 10, 11).

(*q*) *Re Higgins and Percival*, 1888, W. N. 172.

Where the receipt for the rent last due under the underlease had been produced, but it appeared that the superior landlord had brought, though he had practically ceased to prosecute, an action to recover possession of the premises on the ground of breach of covenant to repair, it was held that the purchaser must accept, as sufficient proof that the covenants in the superior lease had been performed, an affidavit by the vendor that he had been in possession of the premises without any other disturbance than the above, that he had repaired the premises, and that, to the best of his knowledge and belief, the covenants had been performed (*r*).

Sale of leaseholds not assignable without the landlord's licence.

When leaseholds are sold, which are subject to a covenant not to assign without the landlord's licence (*s*), the vendor is bound to procure such licence at his own expense, and if he fail to do this, he will not have shown a good title and will have broken the contract (*t*). But it appears that the procuring of the necessary licence is at first to be treated as a matter of conveyance rather than of title (*u*), and the purchaser cannot object to the title on the ground of the absence of any licence to assign, if the vendor procure such licence before the day fixed for completion (*x*). If such property be sold

(*r*) *Ringer* to *Thompson*, 51 L. J. Ch. 42.

(*s*) See Wms. Real Prop. 495, 500, 19th ed. By stat. 55 & 56 Vict. c. 13, s. 3, agreements in leases against assigning or underletting without licence shall, unless the lease contain an express provision to the contrary, be deemed to be subject to a proviso that no fine shall be payable for such licence. If the lease contain a covenant not to assign without the lessor's licence, such licence not to be unreasonably withheld, and the lessor do unreasonably refuse his licence to assign, the lessee may lawfully assign the demised premises without the licence: *Bates* v. *Donaldson*, 1896, 2 Q. B. 241. But he has no right of action against the lessor to recover damages for unreasonably refusing the licence: *Treloar* v. *Bigge*, L. R. 9 Ex. 151; *Scar* v. *House Property, &c. Society*, 16 Ch. D. 387. He may, however, bring an action against the lessor for a declaration that he is entitled to assign without licence: *Young* v. *Ashley Gardens, &c.*, 1903, 2 Ch. 112.

(*t*) *Bain* v. *Fothergill*, L. R. 7 H. L. 158.

(*u*) See above, pp. 130—132.

(*x*) *Monro* v. *Taylor*, 3 Mac. &

under an express stipulation that the sale is subject to the landlord's approval or to his consent to the assignment, the vendor is still bound to use his best endeavours to procure the necessary licence; and if he do this and the licence be refused, he will be discharged from his contract (*y*). If, on the other hand, he fail to fulfil this duty, he will have broken the contract; and in such case he will be liable to compensate the purchaser in damages for the loss of his bargain (*z*), contrary to the general rule (*a*). Whenever leaseholds subject to a covenant against assignment without the lessor's consent are offered for sale, it should be stated that the property is subject to such covenant (*b*), and it should be expressly stipulated that, if the lessor's consent cannot be obtained, the contract shall be rescinded, the vendor returning the deposit, if any, but not paying the purchaser's expenses of investigating the title or otherwise (*c*). If the person to give the licence to assign should not be the original lessor, the vendor would have to prove that such person was the proper person to give the licence; and as this would involve investigation of the landlord's title, it is better for the vendor to relieve himself by express stipulation of the obligation of giving such proof (*d*). Leaseholds subject to a covenant not to assign without the lessor's licence may be sold and conveyed, without committing any

G. 713, 714, 722; *Ellis* v. *Rogers*, 29 Ch. D. 661; *Day* v. *Singleton*, 1899, 2 Ch. 320, 327; and see *Smith* v. *Butler*, 1900, 1 Q. B. 694.

(*y*) *Lehmann* v. *McArthur*, L. R. 3 Ch. 496. In *Day* v. *Singleton*, 1899, 2 Ch. 320, 327, 328, there are *dicta* to the apparent effect that the vendor would in such case be liable at law for breach of the contract; but it is submitted that they must be read as referring to an open contract to sell such leaseholds. In that case the sale was expressly made *subject to the landlord's consent to the transference of the lease*. This, it it is submitted, would clearly absolve the vendor from breach of the contract at law, if he tried his best but failed to obtain the necessary consent.

(*z*) *Day* v. *Singleton*, ubi sup.

(*a*) Above, pp. 30, 31.

(*b*) See above, p. 351.

(*c*) See 1 Davidson, Prec. Conv. 562, 5th ed.; Davidson's Concise Prec. 115, 17th ed.

(*d*) See 1 Key & Elph. Prec. Conv. 273, 274, 7th ed.

breach of the covenant, either by way of underlease (provided that the covenant do not also prohibit underletting) (*e*), or by any disposition operating as an assignment in equity only and not at law, as a declaration of trust for the purchaser (*f*). But if the vendor propose to carry out the sale in either of these ways, he must make an express stipulation to that effect, or the purchaser will not be bound to accept the same as a due performance of the contract. If leaseholds be held subject to a covenant by the lessee not to assign without the lessor's licence, which is not to be unreasonably withheld, and the lessee sell them under an open contract, and the landlord refuse to consent to the proposed assignment on grounds which are apparently unreasonable, it appears that the vendor cannot oblige the purchaser to perform the contract specifically by accepting an assignment without the lessor's consent (*g*); for the lessor may have some good reason for refusing it, and would be at liberty to prove this in an action brought by himself to enforce his right of re-entry for breach of the covenant. The title would therefore be too doubtful for a Court of Equity to force upon an unwilling purchaser (*h*).

Where landlord's consent not to be unreasonably withheld.

Sale of part of land held by lease for years.

If a lessee for years, holding at a rent and subject to lessee's covenants, assign over part of the demised land, the assignee is liable to be distrained upon for the whole of the rent reserved (*i*); although if the lessor sue him personally for the rent, either in debt or on the cove-

(*e*) *Crusoe* d. *Blencowe* v. *Bugby*, 2 W. Bl. 766; *Church* v. *Brown*, 15 Ves. 258, 265.

(*f*) *Gentle* v. *Faulkner*, 1900, 2 Q. B. 267. See also *Horsey Estate, Limited* v. *Steiger*, 1899, 2 Q. B. 79; *Grove* v. *Portal*, 1902, 1 Ch. 727.

(*g*) See above, p. 358, n. (*s*). But of course the vendor would have a good title to assign after he had obtained, in an action against his landlord, a declaration of his right to assign without the landlord's consent.

(*h*) *Re Marshall and Salt's Contract*, 1900, 2 Ch. 202.

(*i*) *Curtis* v. *Spitty*, 1 Bing. N. C. 756, 760; *Hyde* v. *Warden*, 3 Ex. D. 72, 76; see Wms. Real Prop. 66, 69, 326, 19th ed.

nant to pay the rent, he will only be liable to pay an apportioned part of the rent proportionate to the value of the land he holds, as his personal liability to pay the rent arises only from the privity of estate between him and the lessor (*k*). It has been held that, if an assignee of part of land let on lease pay the whole rent reserved by the lease under threat of distress, he cannot assert a right of *contribution* to such payment against an under-lessee of the other part of the land, for the right to *contribution* only arises either at law or in equity where both parties are subject to a common liability (*l*). It is submitted, however, that in such case the party so coerced to pay the whole rent is not without remedy. He has paid off a charge upon the whole of the lands comprised in the lease (*m*), and on general principles of equity he should be entitled to the benefit of the charge, and to stand in the lessor's place as against that part of the demised premises which he does not hold himself (*n*). If a lessee for years holding subject to a proviso for re-entry on breach of covenant assign over part of the demised land, the lease remains determinable as to the whole of the demised premises on any breach of covenant; so that the lessor could re-enter upon the assignee for breach of covenant committed after the assignment by the original lessee with respect to the other part of the land (*o*). If, therefore, a tenant for years holding at a rent and subject to lessee's covenants and a proviso for re-entry on breach of covenant sell part of the land leased to him, and represent that the property sold is held at a rent less than that which he has to pay for the whole of the land, the purchaser could object to the

(*k*) *Hare* v. *Cator*, Cowp. 766; *Stevenson* v. *Lambard*, 2 East, 575.

(*l*) *Johnson* v. *Wild*, 44 Ch. D. 146.

(*m*) See note (*i*), above.

(*n*) This view of the question seems to have escaped the notice of the learned counsel for the plaintiff and of the Court in *Johnson* v. *Wild*, ubi sup.

(*o*) *Hyde* v. *Warden*, 3 Ex. D. 72, 76.

title on the ground that the land sold is charged with the whole of the rent, and is subject to forfeiture for breach of covenant committed in respect of the rest of the land leased (*p*). It follows that on a sale of part only of land held on lease for years, special stipulation must be made precluding objection to the title on these grounds, and providing for apportionment of the rent as between the vendor and the purchaser. When leasehold property is sold in lots, it is usually stipulated that one of the purchasers shall take an assignment of the lease, and the others shall accept underleases either from that purchaser or from the vendor (*q*).

Sale of leaseholds in lots.

§ 3.—*Sale of Lands in a Register County or Compulsory Registration District.*

Lands in Middlesex or Yorkshire.

If the property purchased be situate in Middlesex or Yorkshire (including the town and county of Kingston-upon-Hull), the conveyancer must, of course, have regard, in advising on title, to the law established by the Registry Acts (*r*) for those counties, and to the construction placed on the Middlesex and the old Yorkshire Registry Acts in Courts of Equity with regard to purchasers having notice of prior unregistered assurances (*s*). He should note, in perusing the abstract,

(*p*) *Hyde* v. *Warden*, 3 Ex. D. 72, 76, 81; see also *Fildes* v. *Hooker*, 3 Madd. 193.

(*q*) 1 Dart, V. & P. 148; see 1 Davidson, Prec. Conv. 545, 632, n., 699—701, 4th ed.; ibid. 453, 529, n., 563—566, 5th ed.; 1 Key & Elph. Prec. Conv. 274, and n. (*d*), 7th ed.; Davidson's Concise Precedents, 116, and n. (*b*), 17th ed.

(*r*) Stats. 7 Anne, c. 20, for Middlesex, of which the register was transferred to the Land Registry Office by 54 & 55 Vict. c. 64; 2 & 3 Anne, c. 4; 6 Anne, c. 20 (5 Anne, c. 18, in Ruffhead), for the West Riding of Yorkshire; 6 Anne, c. 62 (c. 35 in Ruffhead), for the East Riding and Kingston-upon-Hull; and 8 Geo. II. c. 6, for the North Riding. All the Yorkshire Acts were repealed and replaced by 47 & 48 Vict. c. 54, amended by 48 & 49 Vict. c. 26.

(*s*) See Wms. Real Prop. 206, 255, 554—556, 19th ed.; 2 Dart, V. & P. 767—776, 958—965; Brickdale on Registration in Middlesex.

whether every document which ought to be registered has been duly registered, and, if not, he should require the vendor to procure the same, if still capable of registration, to be registered at the vendor's expense (*t*). If the omission to register cannot be rectified, the purchaser's counsel must consider whether the circumstances are such as prevent his client from obtaining an indefeasible legal estate in the property purchased, and he should make requisitions or objections as to the title, according to the conclusion at which he arrives. As respects conveyances taking effect *inter vivos*, the general effect of the Middlesex and old Yorkshire Registry Acts was that an unregistered assurance of lands in either of these counties was voidable at law by a subsequent registered assurance of the same lands to a purchaser or mortgagee for valuable consideration. But an unregistered assurance by deed was not void or inoperative; it passed the legal estate to the grantee, and was only defeasible by such a registered assurance as above described (*u*). Thus, if A. granted the same lands by unregistered deed first to B. and subsequently to C., whether for value or not, and C. by registered deed granted the lands to D. on a sale or mortgage, D. did not thus obtain the legal estate or any priority of

(*t*) Sug. V. & P. 546. The memorial to be registered in Middlesex or Yorkshire of any deed was required to be under the hand and seal of some or one of the grantors or grantees, his or their heirs, executors or administrators, guardians or trustees, and to be attested by two witnesses, whereof one should be one of the witnesses to the execution of the deed: Sug. V. & P. 729, 730. The Yorkshire Registries Act, 1884, s. 6, substituted *parties to the deed* for *grantors or grantees* and *one or more* for *two* witnesses. In Middlesex, the memorial is now required to be attested by one witness only, such witness, *where practicable*, to be a witness to the execution of the deed: stat. 54 & 55 Vict. c. 64, s. 2, and First Schedule, r. 2; Land Registry (Middlesex Deeds) Rules, 1892, r. 6; W. N. 13th Feb. 1892. It is sufficient if a witness to the execution of the deed by the grantee attest the memorial: *R.* v. *Registrar for Middlesex*, 21 Q. B. D. 555. In default of compliance with these conditions the registration is void: *Essex* v. *Baugh*, 1 Y. & C. C. C. 620.

(*u*) Grant, M. R., *Jones* v. *Gibbons*, 9 Ves. 407, 411.

interest over B. For when A. granted the lands to C., he had already parted with all his estate therein to B., and A.'s grant to C., being unregistered, could not operate to displace B.'s estate (*x*). If, however, the conveyance from A. to C. were duly registered, as well as that from C. to D., D. would obtain the legal estate, whether he had or had not notice of the conveyance from A. to B. (*y*); but if he had such notice, *in equity* he would obtain no priority of interest over B., and would be a trustee of his legal estate for B.'s benefit (*z*). It has been decided by the House of Lords, in a case upon the Irish Registry Act, that in order to avoid an unregistered assurance it is not necessary that the subsequent registered conveyance should be made by the first grantor personally; it may be made by anyone who, but for the unregistered assurance, would take his estate by operation of law in his lifetime (*a*). And in the same case the English judges, who were called in to advise the House, unanimously expressed the opinion (*b*) that a secret conveyance of a man's lands

(*x*) *Jack* d. *Rennick* v. *Armstrong*, 1 Hud. & B. 727; *Fury* v. *Smith*, ib. 735: both cases on the Irish Registry Act; 2 Dart, V. & P. 963, 964.

(*y*) *Doe* d. *Robinson* v. *Allsop*, 5 B. & A. 142.

(*z*) *Le Neve* v. *Le Neve*, Amb. 436; 2 White & Tudor L. C. Eq. As a rule, actual notice of a previous unregistered assurance was necessary to deprive a purchaser of the benefit of registration: *Wyatt* v. *Barwell*, 19 Ves. 435. He would not lose his priority through not making investigations or inquiries for unregistered documents: *Agra Bank, Limited* v. *Barry*, L. R. 7 H. L. 135; *Lee* v. *Clutton*, 45 L. J. Ch. 43, 46 L. J. Ch. 48. But if his solicitor or agent had actual notice, such notice would be imputed to him: *Rolland* v. *Hart*, L. R. 6 Ch. 678. Registration of an assurance is not of itself equivalent to notice thereof. *Morecock* v. *Dickins*, Amb. 678; *Re Russell Road Purchase Moneys*, L. R. 12 Eq. 78, 83. But if one search in the register, he is affected with notice of registered assurances: *Bushell* v. *Bushell*, 1 Sch. & Lef. 90, 103; *Hodgson* v. *Dean*, 2 Sim. & Stu. 221, 225; *Procter* v. *Cooper*, 1 Jur. N. S. 149.

(*a*) *Warburton* v. *Loveland*, 2 Dow. & C. 480, where a woman entitled to a term of years settled it on her marriage by unregistered assurance, and it was held that this settlement must be postponed to a registered assignment of the term by her husband to a purchaser.

(*b*) 2 Dow. & C. 495.

made by unregistered assurance may be avoided by a registered conveyance from his heir, or even from his devisee (*c*) to a purchaser. Wills of lands in Middlesex or Yorkshire, if not registered within six months of the testator's death, were voidable by a registered conveyance from the testator's heir to a purchaser (*d*); so that the devisee under a will not so registered could not make a good title to the devised lands without the heir's concurrence (*e*). But under the Vendor and Purchaser Act, 1874 (*f*), where such a will has not been registered within due time, an assurance of the land to a purchaser or mortgagee by the devisee, or by someone deriving title under him, shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law. It is not clear to what extent this enactment is retrospective. On a sale of lands in Middlesex by the devisees under an unregistered will of a testator, who died in 1875, subject to the condition that no objection should be taken on account of any document not being registered in Middlesex, the purchaser was obliged to take the title, notwithstanding that it was unknown who was the heir, and search against the heir's name was thus prevented (*g*).

Wills.

(*c*) Assuming, it is presumed, that the will was duly registered: see 2 Dart, V. & P. 683, 684, 5th ed., 772, 6th ed. The rule subsequently laid down by Mr. Dart and his editors (p. 855, 5th ed., 963, 6th ed.), that a purchaser under an unregistered conveyance can only be disturbed by a purchaser from the first grantor or parties taking under him by *act in law*, does not appear to be quite accurately expressed, as a devisee is the testator's assign.

(*d*) That is, if the testator died in Great Britain. Three years were given for registration from the death of a testator dying upon or beyond the seas. In case of an impediment to the registration of the will, a memorial of the impediment might be registered and the will might be registered within six months after the removal of the impediment. See stats. 7 Anne, c. 20, ss. 1, 8, 9; 2 & 3 Anne, c. 4, ss. 1, 20, 21; 6 Anne, c. 35, ss. 1, 14, 15, 34; 8 Geo. 2, c. 6, ss. 1, 15, 16; *Chadwick* v. *Turner*, 34 Beav. 634, L. R. 1 Ch. 310.

(*e*) 2 Dart, V. & P. 682, 683, 5th ed.; 771, 772, 6th ed.

(*f*) Stat. 37 & 38 Vict. c. 78, s. 8.

(*g*) *Girling* v. *Girling*, W. N. 1886, p. 18.

Yorkshire Registries Act, 1884.

The Yorkshire Registries Act, 1884 (*h*), provides that all assurances (*i*) affecting lands in Yorkshire *may be* registered under the Act, and that all assurances entitled to be registered under this Act shall have priority according to the date of registration (*k*), and that all priorities given by this Act shall have full effect in all Courts, except in cases of actual fraud, and all persons claiming thereunder any legal or equitable interests shall be entitled to corresponding priorities, and no such person shall lose any such priority merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud (*l*). This Act appears to have the same effect as the Acts which it repealed (*m*), with respect to the operation of conveyances *inter vivos* at law (*n*); but to abolish the doctrine as to notice applied in equity to the old Acts (*o*). Under the Act of 1884 (*p*), wills of lands in Yorkshire shall have priority according to the date of the testator's death, if registered or entitled to rank as registered, within six months thereafter (*q*); and if registered later, according to the date of registration. But the Act provides (*r*) for the registration within six

(*h*) Stat. 47 & 48 Vict. c. 54, ss. 4, 14, as amended by 48 & 49 Vict. c. 26, s. 4.

(*i*) See *Rodger* v. *Harrison*, 1893, 1 Q. B. 161.

(*k*) By stat. 48 & 49 Vict. c. 26, s. 3, a *caveat* in favour of any person may be registered with respect to any lands in Yorkshire by any person claiming to be entitled to any interest therein; and if, while the *caveat* remains in force, an assurance of the lands from the giver of the *caveat* to the other, his representatives or assigns, be duly registered, such assurance shall have priority as though it had been registered on the date of registration of the *caveat*.

(*l*) See *Battison* v. *Hobson*, 1896, 2 Ch. 403.

(*m*) Above, p. 362, n. (*r*).

(*n*) Above, p. 363.

(*o*) Above, p. 364. This doctrine remains in force with regard to lands in Middlesex.

(*p*) Stat. 47 & 48 Vict. c. 54, ss. 4, 14, amended by 48 & 49 Vict. c. 26, s. 4.

(*q*) If the will cannot be registered within six months after the testator's death, notice of the will may be registered within the same period, and in such case the will, if registered within two years after the testator's death, will have priority as though it were registered on the date of registration of the notice: stat. 47 & 48 Vict. c. 54, s. 11.

(*r*) Sect. 12.

months after a landholder's death of an affidavit of his intestacy, and gives priority, where such an affidavit has been registered, to any duly registered assurance for valuable consideration by any person entitled to execute the same in case of such intestacy, over any will of the supposed intestate which shall be subsequently registered, and shall not be entitled to rank as registered within six months after the testator's death.

Exceptions.

The Middlesex Registry Act and the old Yorkshire Registry Acts do not extend to copyhold estates, leases at a rack rent, or leases not exceeding twenty-one years when the actual possession and occupation go along with the lease (*s*). And the Middlesex Registry Act does not extend to Chambers in Serjeant's Inn, the Inns of Court or Inns of Chancery (*t*), and has no application to the City of London (*u*). The Yorkshire Registry Act, 1884 (*x*), does not extend to copyholds, or to any lease not exceeding twenty-one years, or any assignment thereof, where accompanied by actual possession from the making of such lease or assignment. It may be noted that the non-registration of wills of leaseholds does not appear to be an objection to the title thereto (*y*), as, when a will of leaseholds has been proved, there is no one, like the heir of freeholds, who could possibly convey them to a purchaser so as to defeat the executors' or legatees' title (*z*). And pending probate, the leaseholds could only be lawfully disposed

Wills of leaseholds.

(*s*) Stats. 7 Anne, c. 20, s. 17; 2 & 3 Anne, c. 4, s. 16; 6 Anne, c. 35, s. 29; 8 Geo. II. c. 6, s. 34.

(*t*) Stat. 7 Anne, c. 20, s. 17.

(*u*) Sug. V. & P. 732. Lands taken in 1888 from Middlesex to make up the *county* of London remained subject to the jurisdiction of the Middlesex Registry: stat. 51 & 52 Vict. c. 41, ss. 40, 96.

(*x*) Stat. 47 & 48 Vict. c. 54, s. 28.

(*y*) See 2 Dart, V. & P. 772.

(*z*) Besides this reason, the provisions of the Middlesex and old Yorkshire Registry Acts for registrations of wills of lands appear inapplicable to leaseholds, the memorial being required to be the act of the devisee: see stat. 54 & 55 Vict. c. 64, First Sched. r. 3. The Yorkshire Registries Act, 1884, s. 6, permits registration of a will by the executor.

of by an administrator duly appointed on the supposition of intestacy; in which case the validity of the administrator's dealings therewith would appear to depend on the general law (*a*) and not on the policy of the Registry Acts. It may be observed that since the descent of the legal estate in freeholds has been assimilated to that of chattels real (*b*), it is in most cases, if not in all (*c*), impossible for an heir of freehold lands in Middlesex or Yorkshire to convey the same to a purchaser so as to defeat the title of an executor or devisee under an unregistered will. Lands situate within the jurisdiction of the Middlesex Registry, or any of the Yorkshire Registries, become exempt from such jurisdiction on being registered under the Land Transfer Acts, 1875 and 1897, and no document relating to such lands and executed after such registration, and no testamentary instrument relating to such lands and coming into operation after such registration, need be registered in the county register (*d*). But this provision does not apply to estates and interests excepted from the effect of registration under a possessory or qualified title (*e*), or to an unregistered reversion on a registered leasehold title, or to dealings with incumbrances created prior to the registration of the land (*f*). If any such lands so registered in the Land Registry should afterwards be removed therefrom, they will again become subject to

Lands registered in the Land Registry.

(*a*) See 1 Wms. Exors. Pt. I. Bk. VI. Ch. III.

(*b*) Above, pp. 189, 192.

(*c*) Title must now be made through the administrator in case of intestacy: above, p. 192. But if the existence of a will were not discovered for some years after the testator's death, and the administrator had conveyed to the heir (see above, p. 194) and the heir to a purchaser, both by duly registered deed, it appears that in Middlesex the purchaser's title would prevail over that of the devisee, as in *Chadwick* v. *Turner*, L. R. 1 Ch. 310. So, also, in Yorkshire, if an affidavit of intestacy had been registered (see above, p. 367); if not, *quære*.

(*d*) Stat. 38 & 39 Vict. c. 87, s. 127; 54 & 55 Vict. c. 64, First Sched. § 14; Land Transfer Rules, 1898, r. 24.

(*e*) See stat. 38 & 39 Vict. c. 87, ss. 8, 9; Land Transfer Rules, 1898, rr. 48, 49; Wms. Real Prop. 624, 625, 19th ed.

(*f*) Stat. 60 & 61 Vict. c. 65, First Sched.

the jurisdiction of the county register as from the date of removal (*g*).

Lands in a district where registration of title is compulsory on sale.

Where the land purchased is situate in a district in which registration of title is compulsory on sale, it must be remembered that under the Land Transfer Act, 1897 (*h*), any conveyance on sale (*i*) executed on or after the day on which registration of title on sale was made compulsory in that district (*k*), does not pass

(*g*) Stat. 60 & 61 Vict. c. 65, s. 17 (3).

(*h*) Stat. 60 & 61 Vict. c. 65, s. 20 (1, 2)

(*i*) "Sale" in this enactment appears to be confined to sale strictly so called (see above, pp. 1, 277) and not to extend to transactions in which other valuable consideration than the payment of a price in money is given for the conveyance of land, such as exchange, partition, mortgage and marriage or family settlement, and of course not to voluntary gifts.

(*k*) By Orders in Council dated the 18th July and 20th Oct. 1898, 28th Nov. 1899, 9th March and 10th Dec. 1901, and 6th March, 1902 (W. N. 23rd July and 29th Oct. 1898, 9th Dec. 1899, 23rd March and 21st Dec. 1901, and 15th March, 1902), registration of title was made compulsory on sale in the following districts comprising the county and city of London on the dates mentioned below:—

DISTRICTS.	Days of commencement of Compulsory Registration.
The parishes of Hampstead, St. Pancras, St. Marylebone and St. George's, Hanover Square	1st Jan. 1899.
The parishes of Shoreditch, Bethnal Green, Mile End Old Town, Wapping, St. George's in the East, Shadwell, Ratcliff, Limehouse, Bow, Bromley and Poplar	1st March, 1899.
The parishes of Christ Church, Southwark, St. George the Martyr, Camberwell, Horsleydown, Lambeth, Bermondsey, Newington, Rotherhithe, St. Olave and St. Thomas, St. Saviour and the detached part of the parish of Streatham situate between the parishes of Lambeth and Camberwell	1st Jan. 1900.
The parishes of Battersea, Clapham, Putney, Tooting Graveney, Wandsworth, and the remainder of the parish of Streatham	1st May, 1900.
The remainder of the county of London (except the city)	1st Nov. 1900.
The city of London	1st July, 1902.

It should be noted, however, with regard to the city of London, that

the legal estate in any freehold land situate in that district to the person entitled thereunder unless or until he is registered as proprietor of the land. The expression "conveyance on sale" here means an instrument executed on sale (*l*) by virtue whereof there is conferred or completed a title under which an application for registration as first proprietor of land may be made under the Land Transfer Act, 1875 (*m*). This provision, however, does not apply in the case of the conveyance of sale of an incorporeal hereditament, or mines and minerals apart from the surface, or an undivided share in land, or freeholds intermixed with and indistinguishable from lands of other tenure, or corporeal hereditaments parcel of a manor (*n*) and included in the sale of a manor as such; for nothing in the Act

an Order of Council making registration compulsory was actually in force from the 1st until the end of the 5th day of March, 1902; and it appears that conveyances executed during that time on sale of lands there situate are governed by the law so introduced: see the Orders of 10th Dec. 1901, and 6th March, 1902, cited above. As to conveyances executed on or after the 6th March, 1902, it appears that the last-mentioned Order in Council, being in effect the execution of a power of legislation conferred by statute, would take effect from the first instant of that day, and would operate as a revocation of the previous Order: see stat. 60 & 61 Vict. c. 65, s. 20 (1, 3); *Tomlinson* v. *Bullock*, 4 Q. B. D. 230.

(*l*) See last note but one.

(*m*) Stat. 60 & 61 Vict. c. 65, s. 20 (2). To be entitled to make such an application, a person must have contracted to buy, or be entitled at law or in equity to, or be capable of disposing by way of sale of, an estate in fee simple in the land for his own benefit, whether subject to incumbrances or not; and if he apply as purchaser the vendor must consent to the application; or he must hold the land on trust for sale or be a trustee, mortgagee, or other person having power of sale thereof (including a tenant for life or other person having the power of sale given by the Settled Land Acts), and the persons (if any) whose consent is required to the exercise of the trust or power of sale must consent to the application; or any two or more persons must be entitled for their own benefit, concurrently or successively, or partly in one mode and partly in another, to such estates, rights, or interests in the land as would if vested in one person entitle him to be registered as proprietor: stats. 38 & 39 Vict. c. 87, ss. 5, 68, 69; 60 & 61 Vict. c. 65, ss. 6, 14 (1), and First Schedule; Wms. Real Prop. 617, 618, 622—627, 19th ed.

(*n*) This includes lands held of the manor as copyhold or as customary freehold where the freehold is in the lord, but not lands held of the manor by free tenure: Wms. Real Prop. 409, 410, 451—455, 19th ed.; Williams on Seisin, 30.

is to render compulsory the registration of the title to such hereditaments (*o*). And as regards land situate in a district where registration is compulsory, an assignment on sale of a lease or underlease having at least forty years to run or two lives yet to fall in, and a grant of a lease or underlease for a term of forty years or more, or for two or more lives, executed after the day on which registration was made compulsory in that district, and capable of registration (*p*), operates only as an agreement, and does not pass any legal estate to the assignee or lessee unless or until he is registered as proprietor of the lease or underlease (*q*). The expressions "assignment" and "grant of a lease or underlease" here apply to any instrument by virtue whereof there is conferred or completed a title under which an application for registration as first proprietor of leasehold land may be made (*r*). A term created for mortgage purposes is not capable of registration under the Land Transfer Acts (*s*), so that the above provisions do not affect the grant of such a term. And it appears that they do not affect an assignment on sale of a term originally created for mortgage purposes, for the "assignment" mentioned therein must confer or complete a title under which an application for registration

Leaseholds.

(*o*) Stat. 60 & 61 Vict. c. 65, s. 24.

(*p*) See note (*r*) below as to what leases are capable of registration.

(*q*) Land Transfer Rules, 1898, r. 59.

(*r*) Land Transfer Rules (June, 1899), r. 60. The conditions required to entitle a person to make such an application are the same as in the case of freehold land (above, p. 370, n. (*m*)), except that for an estate in fee simple there is substituted any leasehold land held under a lease which is either immediately or mediately derived out of land of freehold tenure and is for or determinable on a life or lives or for a term of years of which more than twenty-one are unexpired; but a term created for mortgage purposes is not to be deemed a lease within the meaning of these provisions, and nothing in the Land Transfer Act, 1897, is to render compulsory the registration of the title to a lease having less than forty years to run or two lives yet to fall in: stats. 38 & 39 Vict. c. 87, ss. 2, 11; 60 & 61 Vict. c. 65, ss. 14, 24, and First Schedule; Land Transfer Rules, 1898, Nos. 43—57; Wms. Real Prop. 617, 647, 19th ed.

(*s*) Stat. 60 & 61 Vict. c. 65, First Schedule.

as first proprietor of leasehold land may be made, and the owner of a term *created* for mortgage purposes is not entitled to make such an application. Here it may be noticed that the exact scope of the expression "term created for mortgage purposes" is doubtful. It certainly includes the term created on a mortgage of leaseholds by demise, but it is questionable whether it extends to a term limited by a settlement to trustees on the usual trusts to raise portions for younger children, such trusts being to raise the portions not only by mortgage, but also by sale of timber or minerals, or out of the rents and profits, or by any other reasonable means (*t*). If on the purchase of land situate in a district where registration is compulsory, title be deduced under a conveyance on sale, or a grant, or an assignment of a lease, which is affected by the above provisions, it must be ascertained that the purchaser, lessee, or assignee, was duly registered as proprietor of the land, or the legal estate must be required to be got in from the vendor, lessor, or assignor or his representatives, and the title thereto required to be deduced accordingly. And if the land should not have been registered since registration was made compulsory in the district, it must be remembered that the purchaser must himself be registered as proprietor of the land before he can acquire the legal estate on completion of the purchase. The expense of such registration will apparently fall on the purchaser, in the absence of special stipulation, under the general principle that the purchaser must bear the expense of the conveyance to himself of the property sold (*u*). It appears, however, that in the absence of stipulation it is the vendor's duty to procure the purchaser to be registered as proprietor; for the general rule is that the vendor must *make* the conveyance—*i.e.*, do all acts

(*t*) See Wms. Real Prop. 614, and n. (*p*), 19th ed.; 45 Sol. J. 357.

(*u*) Sug. V. & P. 561; 2 Dart, V. & P. 798.

necessary to pass the legal estate—though the purchaser must pay for the conveyance (*x*); and in the present case the legal estate cannot pass until registration. For the same reasons, it does not appear that the vendor can claim payment of the purchase money before the purchaser's registration, the rule being that payment can only be demanded on conveyance of the estate (*x*). When unregistered land situate in a compulsory district is sold, the vendor generally desires that the purchase money shall be paid on the execution by him of a deed of conveyance in the old form, which, of course, only passes an equitable estate to the purchaser, and that the purchaser shall then complete his title by registering himself. But to obtain this it appears necessary to make special stipulations to that effect in the contract for sale.

§ 4.—*Voluntary Conveyances.*

Voluntary conveyances.

Voluntary conveyances, and conveyances revocable by the grantor, of any estate in lands or other hereditaments were liable to be defeated (*z*), before the 29th of June, 1893 (*a*), by a subsequent conveyance thereof by the grantor (*b*) for any valuable consideration; but this

(*x*) See below, Chap. XII., Sects. 1, 5. It is submitted that the case is not parallel to that of the conveyance of land in a register county, when the legal estate passes by the deed of conveyance: above, p. 363.

(*z*) Under the judicial construction of stat. 27 Eliz. c. 4, made perpetual by 39 Eliz. c. 18, s. 31, and avoiding conveyances made with intent to defraud subsequent purchasers: see Sug. V. & P. 712 *sqq.*; 2 Dart, V. & P. 1003 *sq.*; Wms. Real Prop. 77, 19th ed.

(*a*) The date of the passing of the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), providing that voluntary conveyances, if in fact made *bonâ fide* and without any fraudulent intent, should no longer be deemed fraudulent within the meaning of stat. 27 Eliz. c. 4, or be defeated thereunder.

(*b*) Not by his heirs or assigns: *Doe* d. *Newman* v. *Rusham*, 17 Q. B. 723; *Lewis* v. *Rees*, 3 K. & J. 132, 150; unless actually fraudulent: see Sug. V. & P. 713; 2 Dart, V. & P. 1021.

doctrine was not applied to voluntary conveyances in favour of a charity (*c*). And if the grantee under the voluntary conveyance disposed of the lands for valuable consideration the voluntary conveyance could no longer be so defeated by the grantor (*d*). Voluntary conveyances of lands, and also of goods, are voidable if they tend to defeat or delay creditors, as against the grantor's creditors seeking to take the lands or goods in execution in his lifetime, or to make the same applicable in payment of his debts after his death, or as against the trustee in the event of his bankruptcy (*e*). And voluntary conveyances of any property are voidable under the Bankruptcy Act, 1883 (*f*), as against the trustee in the grantor's bankruptcy, if he be adjudged bankrupt within two years after, and also if he be adjudged bankrupt within ten years after, unless it can be shown that at the time of making the conveyance he was able to pay all his debts without the aid of the property so conveyed. But if the grantee under the voluntary conveyance dispose of the lands or goods to a *bonâ fide* purchaser for valuable consideration, the purchaser's title cannot be displaced by the creditors or trustee in bankruptcy of the maker of the voluntary conveyance (*g*). It was held that, on a voluntary assignment of leaseholds subject to the pay-

Leaseholds.

(*c*) *Ramsay* v. *Gilchrist*, 1892, A. C. 412.

(*d*) *Prodgers* v. *Langham*, 1 Sid. 133; Sug. V. & P. 719, 720; 2 Dart, V. & P. 1019.

(*e*) Stat. 13 Eliz. c. 5; *Twyne's Case*, 3 Rep. 81 a, 1 Smith, L. C. 1; *Richardson* v. *Smallwood*, Jac. 552; *Re Ridler*, 22 Ch. D. 74; 2 Dart, V. & P. 1024—1030; Williams on Settlements, 362, 363; see *Maskelyne* v. *Smith*, 1903, 1 K. B. 671.

(*f*) Stat. 46 & 47 Vict. c. 52, s. 47. Under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 91, voluntary conveyances by *traders* were similarly voidable. Voluntary conveyances are not so voidable under the Act of 1883 if the grantor die insolvent, but not bankrupt, and his estate be administered in bankruptcy after his death: *Ex parte Official Receiver, Re Gould*, 19 Q. B. D. 92.

(*g*) See *Halifax Joint Stock Banking Co.* v. *Gledhill*, 1891, 1 Ch. 31, as to stat. 13 Eliz. c. 5; and as to the Bankruptcy Act, 1883, *Re Vansittart*, 1893, 2 Q. B. 377; *Re Brall*, ib. 381; *Re Carter and Kenderdine's Contract*, 1897, 1 Ch. 776.

ment of rent and performance of onerous covenants, the liability so incurred by the assignee was sufficient consideration to save the assignment from being defeated by a subsequent assignment for value (*h*); but this liability does not preserve a voluntary assignment of leaseholds from avoidance by the assignor's creditors or trustee in bankruptcy (*i*). Where title is made under a voluntary conveyance, followed by a conveyance for valuable consideration made by the grantee, the mere fact that the voluntary conveyance was voidable in the interval is not an objection to the title (*k*). But the purchaser is, as we have seen (*l*), entitled to require evidence that the voluntary conveyance was not avoided by a subsequent conveyance for valuable consideration, or otherwise: though after long continued possession in accordance with the title under the voluntary conveyance it will be presumed that it was not so avoided (*m*). Similarly, where title is made under the avoidance prior to the 29th of June, 1893, of a voluntary conveyance by a subsequent conveyance by the grantor for valuable consideration, it does not appear to be a fatal objection that, in the interval, the voluntary conveyance may have ceased to be defeasible (*n*); but the purchaser is entitled to require evidence that it did not so cease to be defeasible, though this would be pre-

Voluntary conveyance.

(*h*) *Price* v. *Jenkins*, 5 Ch. D. 619; *Harris* v. *Tubb*, 42 Ch. D. 79.

(*i*) *Ex parte Hillman, Re Pumfrey*, 10 Ch. D. 622; *Re Ridley*, 22 Ch. D. 74.

(*k*) *Noyes* v. *Paterson*, 1894, 3 Ch. 267.

(*l*) Above, p. 105.

(*m*) *Re Marsh and Earl Granville*, 24 Ch. D. 11, 19.

(*n*) 2 Dart, V. & P. 1119. Before the Voluntary Conveyances Act, 1893 (above, p. 373, n. (*a*)), if a man agreed to sell lands with the intention of defeating a voluntary conveyance thereof previously made by him, the Court would not enforce the specific performance of the contract against an unwilling purchaser at the vendor's suit: *Smith* v. *Garland*, 2 Mer. 123; *Johnson* v. *Legard*, T. & R. 281; *Clarke* v. *Willott*, L. R. 7 Ex. 313; see *Peter* v. *Nicholls*, L. R. 11 Eq. 391, depending on very peculiar circumstances. But the Court would specifically enforce the contract at suit of the purchaser: *Buckle* v. *Mitchell*, 18 Ves. 100; *Rosher* v. *Williams*, L. R. 20 Eq. 210.

sumed from long continued possession under the title given by the avoiding conveyance for value. Since voluntary conveyances have ceased to be defeasible by subsequent conveyances for valuable consideration, it has been held that a grantee of lands under a voluntary conveyance may oblige a purchaser from him to perform the contract specifically, as the purchaser will obtain a title paramount to the claims of the creditors or trustee in bankruptcy of the maker of the voluntary conveyance (*o*). Under the Finance Act, 1894 (*p*), if a voluntary conveyance be not made *bonâ fide* twelve months before the grantor's death, or if *bonâ fide* possession be not assumed by the grantee under a voluntary conveyance immediately upon the making thereof, and thenceforward retained, to the entire exclusion of the grantor, or of any benefit to him by contract or otherwise, or if a voluntary conveyance reserve a life interest or power of revocation to the grantor, estate duty will be payable at his death in respect of the property conveyed. Purchasers of lands from the grantees under voluntary conveyances should have regard to this liability, and require to be satisfied that the grantor lived for a year at least after the making of the voluntary conveyance, or that the estate duty (which falls upon the grantee) has been discharged, and also that the conveyance was not attended by any other circumstance which would make the lands chargeable with estate duty (*q*). Since the passing of the Finance Act, 1894, many voluntary conveyances have been made with the object of escaping the liability to pay estate duty on the grantor's death.

(*o*) *Re Carter and Kenderdine's Contract*, 1897, 1 Ch. 776; above, p. 374.

(*p*) Stat. 57 & 58 Vict. c. 30, ss. 1, 2 (1 *e*); above, p. 225.

(*q*) See *A.-G.* v. *Earl Grey*, 1898, 1 Q. B. 318, 2 Q. B. 534; 1900, A. C. 124.

§ 5.—*Sale of Ground Rents, Reversions and Remainders.*

Purchase of ground rents.

The property commonly described as freehold or leasehold ground rents is nothing else than the freehold or leasehold reversion expectant on the determination of a building lease (*r*); and the purchaser of a freehold or leasehold ground rent described as such is entitled to have conveyed to him such a freehold or leasehold reversion expectant on a lease reserving a ground rent (*s*) as will enable him to distrain and pursue the other usual lessor's remedies for recovery of the rent (*t*). The points to be attended to on behalf of the purchaser of such property are, first, to see that he gets the reversion on the lease, so as to be enabled to enforce all the lessor's remedies, whether by distress, action on the lessee's covenants, or re-entry, for non-payment of the rent reserved and breach of the lessee's covenants; and secondly, to ascertain that the vendor has been in actual receipt of the rents, the right to which constitutes the profitable part of the thing sold. Whether the first of these requirements is fulfilled will of course appear from the usual investigation of the documentary title; the second is necessary to ensure that the purchaser is not getting a paper title and nothing more. The title which ought to be abstracted on the purchase under an open contract of a reversion expectant on a lease for years has been already shown (*u*). If the lease be more than forty years old, the title to the reversion, if freehold, must be carried back so as to show that the lease

(*r*) *Maundy* v. *Maundy*, 2 Str. 1020.

(*s*) Ground rent properly means the rent at which land is let for the purpose of improvement by building. Thus, it conveys the idea of something less than the rack rent, and a purchaser of a ground rent described as such without further explanation will not be compelled to accept a rack rent: *Stewart* v. *Alliston*, 1 Mer. 26; *Bartlett* v. *Salmon*, 6 De G. M. & G. 33, 41; 1 Dart, V. & P. 138.

(*t*) *Lecoy* v. *Mogford*, 2 Jur. N. S. 1084; *Langford* v. *Selmes*, 3 K. & J. 220; *Evans* v. *Robins*, 8 Jur. N. S. 846; cf. *Smith* v. *Watts*, 4 Dr. 338.

(*u*) Above, pp. 78, 82.

was well granted. If the reversion sold be leasehold, the title should of course commence with the lease, under which the reversion is derived (*x*). The vendor of a reversion on a lease is under no obligation to deduce the title under the lease so as to prove who is the assignee thereof or person entitled thereunder at the time of sale; it is sufficient if he show that there is a person in possession paying to him the rent reserved on the lease (*y*). The purchaser should of course inquire who is in possession of the property demised under the lease on which he is purchasing the reversion, and should ask the person so ascertained to be in possession as to the extent of his interest in the property (*z*), and also whether he has been paying rent to the vendor. If such person be not the actual occupant of the property, inquiry should be made of the occupant as to the nature of his interest in the property, and to whom he pays rent (*a*). A tenant or occupant is not bound to answer any inquiry to whom he pays his rent (*b*): but where the inquiry is made in connection with the purchase of the reversion, the information sought is in most cases not likely to be withheld. If it should be refused, it is submitted that the vendor would be bound to furnish some other evidence of his receipt of the rent sold. This is merely equivalent to the duty of a vendor of land in possession to produce land corresponding with that described in the contract for sale (*c*); and it is obvious that for the purchaser to dispense with such evidence would be to run the risk of the vendor's title having been extinguished by payment of the rent for

(*x*) Above, p. 81.

(*y*) *Flint* v. *Woodin*, 9 Hare, 618, 621.

(*z*) If he omit this, he will take with notice of such interest: see *Hunt* v. *Luck*, 1901, 1 Ch. 45, 49; Chap. XII., Sect. 2, below.

(*a*) If the occupant should not be paying rent to the vendor's tenant, the inquiry should be pursued until all the links of the chain between the vendor and the occupant have been discovered.

(*b*) *Hunt* v. *Luck*, 1901, 1 Ch. 45, 53.

(*c*) See above, p. 36.

twelve years or more to some person wrongfully claiming to be entitled to the land in reversion (*d*).

Effect of grant of reversion.

Here the reader may be reminded that by a grant of the freehold reversion on a lease for years the rent reserved (which is incident to the reversion) passes to the grantee at common law, and, since statute 4 & 5 Anne, c. 3 (*e*), without the necessity of any attornment by the tenant; and the grantee may distrain or sue for the rent accordingly (*f*). By statute 32 Hen. VIII. c. 34, the grantee of such a reversion is enabled to sue upon such of the lessee's covenants contained in the lease as "touch or concern" the land demised (*g*), and also to take advantage of any condition of re-entry contained in the lease for non-payment of rent or breach of covenant (*h*). This statute, however, does not enable the grantee of the reversion to sue upon any covenant by the lessee which is collateral, and does not touch or concern the land demised (*i*), or to sue at law upon any agreement to be performed by a lessee and contained in a lease not made by deed (*k*). But in consequence of the doctrine introduced since the commencement of the Judicature Acts (*l*) that, where land is held under an agreement for a lease of which either

(*d*) Stats. 3 & 4 Will. IV. c. 27, ss. 9, 34; 37 & 38 Vict. c. 57, ss. 1, 9: see *Doe* d. *Angell* v. *Angell*, 9 Q. B. 328, 355—359; *Williams* v. *Pott*, L. R. 12 Eq. 149. But in the case of mere non-payment of the rent for twelve years or more the vendor's title will not have been affected, though the arrears recoverable will be limited: see *Grant* v. *Ellis*, 9 M. & W. 113, 126, 127; *Archbold* v. *Scully*, 9 H. L. C. 360, 375. As to the case in which a good title has been acquired under the Statute of Limitations as against the lessee, see *Walter* v. *Yalden*, 1902, 2 K. B. 304.

(*e*) [C. 16 in Ruffhead] s. 9: see *Allcock* v. *Moorhouse*, 9 Q. B. D. 366.

(*f*) Litt. ss. 58, 72, 213, 214, 228, 229, 572; Sug. V. & P. 583; Dart, V. & P. 914; Wms. Real Prop. 330, 19th ed.

(*g*) *Spencer's case*, 5 Rep. 16, 18; Sug. V. & P. 582, 583; Dart, V. & P. 916.

(*h*) Co. Litt. 215.

(*i*) 5 Rep. 18; Sug. V. & P. 583; and see *Webb* v. *Russell*, 3 T. R. 393.

(*k*) *Standen* v. *Christmas*, 10 Q. B. 135; *Bickford* v. *Parson*, 5 C. B. 920.

(*l*) Stats. 36 & 37 Vict. c. 66; 37 & 38 Vict. c. 83; 38 & 39 Vict. c. 77.

landlord or tenant can enforce specific performance, the party so entitled is to be treated, in all Courts having jurisdiction to decree specific performance of the contract, as holding the land as landlord or tenant thereof *at law* upon the terms of the agreement (*m*), it has been decided that, where land is held for a term of years under a contract not made by deed but specifically enforceable by the landlord, and the landlord assigns the reversion with the benefit of the contract, the assignee is entitled to enforce all stipulations by the lessee contained in the contract and relating to the land demised as effectually as if such stipulations had been expressed in covenants contained in a lease by deed (*n*).

Severance of reversion.

Where land has been let for a term of years and the reversion of part only of the land is assigned over, the rent is apportionable at common law (*o*), and the assignee can sue on the lessee's covenants under the statute of Hen. VIII. with respect to that part of the land of which the reversion has been assigned to him (*p*). But the assignee of the reversion of part of lands demised could not at common law take advantage of any condition of re-entry contained in the lease (*q*). By Lord St. Leonards' Act (*r*) such an assignee was allowed to take the benefit of a condition of re-entry for non-payment of rent, where the rent had been legally apportioned (*s*). And under the Conveyancing

(*m*) *Walsh* v. *Lonsdale*, 21 Ch. D. 9; *Furness* v. *Bond*, 4 Times L. R. 457; *Lowther* v. *Heaver*, 41 Ch. D. 248, 264; *Crump* v. *Temple*, 7 Times L. R. 120; *Foster* v. *Reeves*, 1892, 2 Q. B. 255.

(*n*) *Manchester Brewery Co.* v. *Coombs*, 1901, 2 Ch. 608.

(*o*) 2 Inst. 504. Rent can only be legally apportioned with the consent of the tenant to the apportionment, or by the verdict of a jury: *Bliss* v. *Collins*, 5 B. & A. 876; *Mayor of Swansea* v. *Thomas*, 10 Q. B. D. 48; 1 Davidson, Prec. Conv. 546, 4th ed.; 452, 5th ed.

(*p*) *Twynam* v. *Pickard*, 2 B. & A. 105; *Badeley* v. *Vigurs*, 4 E. & B. 71; *Mayor of Swansea* v. *Thomas*, 10 Q. B. D. 48.

(*q*) Co. Litt. 215a.

(*r*) Stat. 22 & 23 Vict. c. 35, s. 3.

(*s*) See above, note (*o*).

Act of 1881 (*t*) such an assignee may take advantage of every condition of re-entry or other condition (including, of course, a condition of re-entry for breach of covenant) contained in the lease, if the lease were made after the year 1881. If the lease were made before the year 1882, the assignee of the reversion of part of the land demised cannot take advantage of a proviso for re-entry on breach of covenant. Where lands have been let to a tenant from year to year, and the reversion of part of the lands is assigned, a valid notice to quit can only be given by the persons for the time being entitled to the reversion of the whole of the demised premises, and the assignee of the reversion of part cannot give notice to determine the tenancy as to his part (*u*). It does not appear that in this respect the law has been altered by the Conveyancing Act of 1881 (*x*).

Reversions or remainders on an estate of freehold.

As we have seen (*y*), on the purchase under an open contract of a reversion or remainder expectant on an estate of freehold, the title must be carried back to the instrument creating the same, whatever be its date; and proof must be given that the possession of the land has been in accordance with that instrument. The main difficulty in establishing the title to such interests arises from the fact that, as the tenant of the particular estate is entitled to the custody of the title deeds, no proof can be given, beyond the vendor's affirmation, that the reversion or remainder sold has not been previously disposed of by way of sale or mortgage (*z*). Purchasers

(*t*) Stat. 44 & 45 Vict. c. 41, s. 12.

(*u*) *Prince* v. *Evans*, 29 L. T. N. S. 835; see also *Doe* d. *Prichitt* v. *Mitchell*, 1 Brod. & Bing. 11; *Right* d. *Fisher* v. *Cuthell*, 5 East, 491, 498, per Grose, J.; *Doe* d. *Aslin* v. *Summersett*, 1 B. & Ad. 135, 141.

(*x*) Stat. 44 & 45 Vict. c. 41, see ss. 10, 12.

(*y*) Above, pp. 82, 83.

(*z*) Wms. Real Prop. 463, 13th ed.; 580, 19th ed. The purchaser can of course inquire of the person entitled to the custody

of reversions or remainders expectant on estates for life or other interests conferring the power of sale and other powers given by the Settled Land Acts, 1882 to 1890 (*a*), take subject to the subsequent exercise of such powers by the particular tenant, and their estates are liable to be divested accordingly, and in the case of sale to be transferred to the purchase money (*b*). As we have seen (*c*), purchasers of such estates take subject to the liability to pay any succession or estate duty which shall be charged thereon when the same shall fall into possession. But where such estates have been *bonâ fide* sold for full consideration in money or money's worth, before the 2nd of August, 1894 (the date of the commencement of the Finance Act, 1894), no other duty will be payable, when the estates fall into possession, than would have been payable if that Act had not passed (*d*). Sales of reversionary interests were formerly liable to be set aside in equity on the ground of mere inadequacy of consideration (*e*). But this rule was abolished by statute as from the 1st of January, 1868, since when no purchase made *bonâ fide* and without fraud or unfair dealing, of any reversionary interest in real or personal estate is to be opened or set aside merely on the ground of undervalue (*f*). On the purchase of reversionary property, time is of the essence of the contract (*g*), and as the wearing out of the interest

of the title deeds whether he is aware of any sale of the reversion, and whether the deeds have been produced at the request of the reversioner with a view to any sale or mortgage by him (see above, p. 330); but the person interrogated is not bound to answer, and an answer in the negative is no certain protection, as the reversion may have been disposed of by way of sale or mortgage without the knowledge of the particular tenant, and without production of the title deeds.

(*a*) Stats. 45 & 46 Vict. c. 38; 47 and 48 Vict. c. 18; 50 & 51 Vict. c. 30; 52 & 53 Vict. c. 36; 53 & 54 Vict. c. 69.

(*b*) *Wheelwright* v. *Walker*, 23 Ch. D. 752; see above, pp. 313—334.

(*c*) Above, pp. 216, 239.

(*d*) Stat. 57 and 58 Vict. c. 30, s. 21 (3); above, p. 228.

(*e*) See 2 Dart, V. & P. 844 *sq.*

(*f*) Stat. 31 Vict. c. 4.

(*g*) Above, pp. 47, 49; *New-*

of the particular tenant is considered equivalent to perception of the profits, interest is payable on the purchase money from the date of the contract, if no time be specified for completion (*h*); or if a time be fixed for completion, then from that time (*i*).

§ 6.—*Sale of purely Incorporeal Hereditaments.*

Sale of purely incorporeal hereditaments.

Upon the purchase of purely incorporeal hereditaments, the general rule as to the title required to be shown is the same as upon the purchase of land, that is to say, if the incorporeal hereditament be sold in fee and under an open contract, forty years' title, commencing with a good root of title, must be shown (*k*). This applies equally to the sale of a seigniory, a rent-charge, a *profit à prendre*, a franchise, or an easement. The exceptions are those already noted (*l*) of the sale of tithes or other property held under a grant from the Crown, and of an advowson. Upon a contract to grant in fee a new incorporeal hereditament to be exercisable over or issue out of the grantor's land, such as a right of way or a rent-charge, the same title must be shown to all the land, which will be subject to the grant, as upon a sale thereof (*m*).

Contract to grant an incorporeal hereditament *de novo*.

Rent-charge.

On the sale of a rent-charge in fee, besides the documentary title, evidence must be given that the vendor is

man v. *Rogers*, 4 Bro. C. C. 391; Sug. V. & P. 262; 1 Dart, V. & P. 484.

(*h*) *Ex parte Manning*, 2 P. W. 410; *Child* v. *Abingdon*, 1 Ves. jun. 94; *Champernowne* v. *Brooke*, 3 Cl. & Fin. 4, 23; *Brooke* v. *Champernowne*, 4 Cl. & Fin. 589; *Enraght* v. *Fitzgerald*, 2 Dr. & War. 43, 47; *Vesey* v. *Elwood*, 3 Dr. & War. 74, 82; *Wallis* v. *Sarel*, 5 De G. & S. 429.

(*i*) *Bailey* v. *Collett*, 18 Beav. 179; Sug. V. & P. 628; 2 Dart, V. & P. 712.

(*k*) See above, pp. 79, and n. (*s*), 81, 87.

(*l*) Above, pp. 78, 82.

(*m*) The principle of this is the same which was applied in deciding that one, who contracted to grant a lease for years, was bound to show a good title to the freehold of the lands to be leased: above, p. 78, n. (*k*); *Fildes* v. *Hooker*, 2 Mer. 424.

in actual receipt of the rent sold, as in the case of a sale of ground rents (*n*). This is the more necessary on the sale of a rent-charge, in that such a rent may be barred and extinguished after twelve years' non-payment under the Statute of Limitations (*o*). The purchaser should inquire of the terre-tenant whether he pays the rent in question to the vendor (*p*). Purchasers of perpetual rents, whether rents service, rents-charge or rents seck, should not forget that a rent in fee, not being a tithe rent-charge or a rent reserved on a sale or lease or made payable under a grant or licence for building purposes, is redeemable on the requisition of any person interested in the land, out of which the rent issues, at an amount of money to be certified by the Board of Agriculture (*q*). With regard to the remedies to which a purchaser of a rent in fee will become entitled, rents seck are of course now recoverable by distress equally with rents-charge (*r*); owners of rents have, since the abolition of real actions, been allowed a remedy by suing the terre-tenant personally (*s*); and they may apply to a Court of Equity to order any arrears of the rent to be raised by sale or mortgage of the land, out of which it issues, the granting of such relief being discretionary (*t*). Where the rent sold is a rent-charge in fee created on a grant of land for building purposes in consideration of a rent-charge, it will of course be borne in mind that any covenant contained in the deed of grant that the grantee, his

Perpetual rents, when redeemable.

Remedies of owners of rents.

Covenant to pay a rent-charge.

(*n*) Above, p. 377.

(*o*) See *Grant* v. *Ellis*, 9 M. & W. 113; *De Beauvoir* v. *Owen*, 5 Ex. 166; *Dean of Ely* v. *Bliss*, 2 De G. M. & G. 459, 472.

(*p*) See above, p. 378.

(*q*) Stats. 44 & 45 Vict. c. 41, s. 45; 52 & 53 Vict. c. 30, s. 2.

(*r*) Stat. 4 Geo. II. c. 28, s. 5; Wms. Real Prop. 416, 417, 19th ed.

(*s*) *Thomas* v. *Sylvester*, L. R. 8 Q. B. 368; *Re Blackburn, &c. Building Society, Ex parte Graham*, 42 Ch. D. 343; *Searle* v. *Cooke*, 43 Ch. D. 519; *Pertwee* v. *Townsend*, 1896, 2 Q. B. 129; *Re Herbage Rents*, 1896, 2 Ch. 811. The decision in *Thomas* v. *Sylvester* is criticised by the author in L. Q. R. xiii. 288.

(*t*) *Hambro* v. *Hambro*, 1894, 2 Ch. 564.

heirs and assigns will pay the rent or build on the land is only a personal covenant and will not run with the land, either at law or in equity, so as to be enforceable against the grantee's assigns (*u*). Where on such a grant the rent-charge and the grantee's estate have been limited by way of use to be executed by the Statute of Uses (*x*), and there has been a proviso allowing the grantor, his heirs or assigns, on non-payment of the rent or breach of covenant to re-enter and hold the land charged in fee, it appears, according to modern doctrine (*y*), that the right of re-entry is void, at least as regards the grantor's heirs and assigns, unless it were so limited that it must necessarily arise within the period allowed by the rule against perpetuities. But a power given on such a grant of a rent-charge in fee for the grantee, his heirs or assigns, to enter on the land charged, in case of non-payment of the rent, and hold the land until all arrears of the rent and all expenses shall have been discharged, appears to stand upon a different footing. Such a power is regarded as remedial only and as being part of the estate which the grantee has in the rent; and whether the power be conferred in express words or by virtue of the 44th section of the Conveyancing Act of 1881 (*z*), there appears to be no good reason for supposing that the same is invalid, if not limited to arise within the period allowed by the rule against perpetuities (*a*). Here the reader may be reminded that, before the 13th of August, 1859, a release by the owner of a rent-charge of part of the

Proviso for re-entry on non-payment of rent-charge.

Release of part of land subject to a rent-charge.

(*u*) *Haywood* v. *Brunswick, &c. Building Society*, 8 Q. B. D. 403; *Austerberry* v. *Oldham*, 29 Ch. D. 750.

(*x*) Stat. 27 Hen. VIII. c. 10.

(*y*) *Dunn* v. *Flood*, 25 Ch. D. 629, 28 Ch. D. 586, 592; *Re Hollis's Hospital and Hague's Contract*, 1899, 2 Ch. 540, 554; Gray, Rule against Perpetuities, § 303, p. 216. See below, Chap. XII. Sect. 3.

(*z*) Stat. 44 & 45 Vict. c. 41.

(*a*) *Havergill* v. *Hare*, Cro. Jac. 510; Sugd. Gilb. Uses, 178, 179; Lewis on Perpetuities, 618; Davidson, Prec. Conv. vol. ii. part i. 508, 511, and notes, 4th ed.; Gray, Rule against Perpetuities, § 303, p. 216. See below, Chap. XII. Sect. 3.

lands, out of which the rent issued, had the effect of entirely extinguishing the rent-charge (*b*). Since then, if such a release be made, the right only to recover any part of the rent-charge out of the lands released is barred; and the lands not included in the release remain liable, not to the whole rent-charge, but only to a part thereof proportionate to their value (*c*).

Registration of a rent-charge, where necessary.

No registration is required to perfect in any way the grant of a rent in fee or in tail. But an annuity or rent-charge granted, otherwise than by marriage settlement or will, for a life or lives or for any estate determinable on a life or lives, must be registered in the ~~Central~~ Office of ~~the Supreme Court~~ Land Registry against the name of the person, whose estate is intended to be affected, otherwise the same will not affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors (*d*). Purchasers, however, who take with notice of such annuities or rent-charges, are bound by them in equity, although they be not registered (*e*). Rent-charges coming within the definition of a land charge contained in the Land Charges Act, 1888, and created after that year, must be duly registered at the Office of Land Registry, or they will be void as against a purchaser for value of the land charged, or any interest therein (*f*). And similar rent-charges pre-

(*b*) Litt. ss. 222, 224; *Dennett* v. *Pass*, 1 Bing. N. C. 388; Wms. Real Prop. 425, 19th ed.

(*c*) Stat. 22 & 23 Vict. c. 35, s. 10; *Booth* v. *Smith*, 14 Q. B. D. 318.

(*d*) Stat. 18 & 19 Vict. c. 15, ss. 12, 14, passed 26th April, 1855, and applying to annuities or rent-charges granted after the passing of the Act. The registration was formerly required to be made in the Court of Common Pleas; see stat. 42 & 43 Vict. c. 78; R. S. C. 1883, Ord. LXI.

(*e*) *Greaves* v. *Tofield*, 14 Ch. D. 563.

(*f*) Stat. 51 & 52 Vict. c. 51, s. 12. By sect. 4, "land charge" means a rent, or annuity or principal moneys payable by instalments, or otherwise, with or without interest, charged otherwise than by deed upon land under the provisions of any Act of Parliament for securing to any person either the moneys spent by him, or the costs, charges and expenses incurred by him under such Act, or the moneys

viously created but assigned by act *inter vivos* after that year must be duly registered at the Office of Land Registry. For the same Act further provides that, after the expiration of one year from the first assignment made by act *inter vivos* after the year 1888 of a similar rent-charge previously created, the person entitled thereto shall not be able to recover the same as against a purchaser for value of the land charged, or any interest therein, unless the charge be so registered before the completion of the purchase (*g*). The rent-charges, to which these provisions apply, are mainly those created under the Improvement of Land Act, 1864 (*h*), or other Land Improvement Acts (*i*). By the Improvement of Land Act, 1899 (*k*), rent-charges created either before or after that Act under the Improvement of Land Act, 1864, or any special Improvement Act, shall be recoverable, as regards any instalment accruing due after the year 1899, by the like remedies as are provided by the Conveyancing Act of 1881 in respect of rent-charges thereafter created, *and not otherwise*. This appears to preclude the owners of such rent-charges from recovering such arrears by personal action against the terre-tenant under the doctrine laid down in *Thomas* v. *Sylvester* (*l*). When a rent-charge sold is of such a kind that it requires registration, the conveyancer advising the purchaser should of course inquire whether the necessary registration was duly made. If not, he should object to the

advanced by him for repaying the moneys spent, or the costs, charges and expenses incurred by another person under the authority of an Act of Parliament, and a charge under the 35th section of the Land Drainage Act, 1861, or under the 29th section of the Agricultural Holdings (England) Act, 1883, but does not include a rate or scot.

(*g*) Stat. 51 & 52 Vict. c. 51, s. 13. By sect. 4, in this Act "purchaser for value" includes a mortgagee or lessee or other person who for valuable consideration takes any interest in land or a charge on land.

(*h*) Stat. 27 & 28 Vict. c. 114.

(*i*) See Wms. Real Prop. 124, 19th ed.

(*k*) Stat. 62 & 63 Vict. c. 46, s. 3.

(*l*) Above, p. 384, n. (*s*).

title, unless the defect should be removable by subsequent registration, as it might be if since the grant of the rent-charge there had been no dealing for value with the land charged.

Tithe rent-charge.

Lands sold as tithe-free.

An impropriate tithe rent-charge, being of course a rent-charge in commutation of tithes (*m*), is subject to the rules already mentioned as to proof of title on the sale of tithes (*n*). And when lands are sold as tithe-free owing to the merger of the tithe rent-charge therein (*o*), the title to the tithes prior to the merger must be shown in the absence of stipulation to the contrary. If the tithes should have been merged more than forty years before the sale, the grant of the tithes from the Crown and, apparently, the instrument of merger must still be produced (*p*). If lands be sold as tithe-free, and the exemption be alleged to arise from other cause than merger (*q*), the facts giving rise to the exemption must be strictly proved (*r*). And if land sold as tithe-free should not be free from tithe, the purchaser will not be compelled to take the title (*s*).

Advowson.

The length of title which must be shown on a sale of

(*m*) Wms. Real Prop. 434, 436, 19th ed.

(*n*) Above, p. 82.

(*o*) A tithe rent-charge can only be merged by the execution of some instrument under stats. 6 & 7 Will. IV. c. 71, s. 71; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62, s. 1; 9 & 10 Vict. c. 73, ss. 18, 19. It does not merge by the mere fact of the union in the same person of the estate in the land and in the tithes: Shelford on Tithes, 292, n., 3rd ed.

(*p*) Sug. V. & P. 367; 1 Dart, V. & P. 295, 5th ed.; 336, 6th ed. But any instrument purporting to merge any tithes or rent-charge, and executed with the consent of the Tithe Commissioners before the passing of stat. 9 & 10 Vict. c. 73, s. 19 (26th August, 1846), is valid and effectual to merge the tithes, although the person purporting to merge the tithes had no estate therein: *Walker* v. *Bentley*, 9 Hare, 629. The production of such an instrument appears, therefore, to be sufficient proof of the merger of the tithe.

(*q*) See Burton's Compendium, ch. 6, sect. 4; stats. 2 & 3 Will. IV. c. 100; 4 & 5 Will. IV. c. 83; *Salkeld* v. *Johnston*, 1 Mac. & G. 242.

(*r*) Dart, V. & P. 401, 402, 1201, n. (*q*); above, p. 141, and n. (*r*).

(*s*) *Ker* v. *Clobury*, Sug. V. & P. 321; *Binks* v. *Rokeby*, 2 Swanst. 222.

an advowson under an open contract has been already noticed (*t*). On the sale of an advowson, the abstract of title should be accompanied with or comprise a list of the presentations made during the time for which title has to be deduced, so as to show that enjoyment has gone along with the title (*u*). The purchaser should verify this list of presentations by examination of the bishop's institution book or diocesan register of institutions, the entry in which is, next to the presentation itself (if in writing), good evidence of the presentation (*x*). The law relating to the sales of advowsons is now regulated by the Benefices Act, 1898 (*y*). Prior to that Act, an advowson was as freely saleable and transferable as any other real property, subject only to the laws by which any presentation made to an ecclesiastical benefice in consideration of any profit or benefit was void as simoniacal (*z*). With respect to this, the following distinctions were established:—It was not simoniacal for any person, whether layman or clerk, to purchase an advowson, either in fee or for any less estate, while the church was full; and the conveyance on such a purchase would carry with it the right of next presentation, however immediate were the prospect of a vacancy at the time of sale, provided that the vacancy were not occasioned by some agreement or arrangement between the parties (*a*). And if a clerk so purchased an estate in fee or for life in an advowson, he might present himself to the living (*b*). But any agreement or

(*t*) Above, p. 82.

(*u*) Sug. V. & P. 367; 1 Dart, V. & P. 334; 1 Davidson, Prec. Conv. 527, 4th ed.; 439, 5th ed.

(*x*) See *Tillard* v. *Shebbeare*, 2 Wils. K. B. 366. The register appears to be such a public document as is admissible in evidence on mere production from its proper custody: 1 Phillimore, Eccl. Law, 354, 355, 2nd ed.; *R.* v. *Bishop of Ely*, 8 B. & C. 112; see above, pp. 100, 101.

(*y*) Stat. 61 & 62 Vict. c. 48.

(*z*) *Barret* v. *Glubb*, 2 W. Bl. 1052; *Fox* v. *Chester*, 3 Bli. N. S. 123; *Exeter* v. *Marshall*, L. R. 3 H. L. 17, 45, 52; *Walsh* v. *Lincoln*, L. R. 10 C. P. 518; see Bac. Abr. Simony.

(*a*) See preceding note.

(*b*) See *Walsh* v. *Lincoln*, L. R. 10 C. P. 518; *Lowe* v. *Chester*, 10 Q. B. D. 407.

arrangement between the parties to the sale of an advowson for causing the living to become vacant was simoniacal; and a presentation made upon any vacancy so caused was void, and the right of presentation for the next turn became forfeited to the Crown (*c*). A sale of an advowson made while the church was vacant did not carry with it the right of next presentation (*d*), but was in other respects perfectly valid and passed the right of presentation for all subsequent turns. And if an advowson were sold and conveyed while the church was full and at the same time a simoniacal arrangement were made for causing a vacancy, the next presentation only was forfeited to the Crown, and the conveyance was otherwise good and passed the right of presentation for the succeeding turns (*e*). And the sale of the right of next presentation only was valid if made while the church was full (*f*), though not if it were vacant; but a clerk was prohibited from purchasing a next presentation in order to present himself to the living (*g*).

Benefices Act, 1898.

By the Benefices Act, 1898 (*h*), a transfer of a right of patronage of a benefice shall not be valid unless (1) it is registered in the prescribed manner (*i*) in the registry of the diocese within one month from the date of the transfer, or within such extended time as under special circumstances the bishop may think fit to allow; (2) it transfers the whole interest of the transferor in the right except as thereinafter provided; and (3) more than twelve months have elapsed since the last institution or admission to the benefice. The expression *transfer* here

(*c*) Stat. 31 Eliz. c. 6, s. 5; Abbott, C. J., *Fox* v. *Chester*, 2 B. & C. 635, 660; Cripps' Laws of the Church, 475, 476, 6th ed.

(*d*) *Alston* v. *Atlay*, 7 A. & E. 289.

(*e*) *Greenwood* v. *London*, 5 Taunt. 727.

(*f*) *Fox* v. *Chester*, 3 Bli. N. S. 123.

(*g*) Stat. 12 Anne, st. 2, c. 12, s. 2.

(*h*) Stat. 61 & 62 Vict. c. 48, s. 1 (1).

(*i*) See Benefices Rules, 1898, W. N. 7th Jan. 1899.

includes any conveyance or assurance passing or creating any legal or equitable interest *inter vivos*, and any agreement for such conveyance or assurance; but does not include a transfer on marriage, death, or bankruptcy, or otherwise by operation of law, or a transfer on the appointment of a new trustee where no beneficial interest passes (*k*). And nothing in this enactment shall prevent the reservation or limitation in a family settlement of a life interest to the settlor, or in a mortgage the reservation of a right of redemption (*l*). The Act also invalidates (*m*) any agreement for any exercise of a right of patronage of a benefice in favour or on the nomination of any particular person, and any agreement on the transfer of a right of patronage of a benefice for the resignation of a benefice in favour of any person. Any conveyance either of an advowson or a next presentation must now conform with the requirements of this Act or it will be invalid. The second requirement imposed by the Act appears to invalidate sales or grants by the owners of an advowson (*n*) of the next presentation or any less estate or interest than the whole fee simple in the advowson; except only by way of reservation or limitation in a family settlement of a life interest to the settlor, or of reservation in a mortgage of an equity of redemption. And it is to be noted that, even in a family settlement, only the limitation of a life interest to the settlor is allowed; so that the limitation of an advowson by a settlor entitled in fee simple to himself in tail or to others for any estate in tail, for life, or for any term of years, appears to be

(*k*) Sect. 1 (6).

(*l*) Sect. 1 (7).

(*m*) Sect. 1 (3). By sect. 2 (1a), a bishop may refuse to institute or admit a presentee to a benefice if at the date of the vacancy not more than one year has elapsed since a transfer as defined by the first section of this Act of the right of patronage of the benefice, unless it be proved that the transfer was not effected in view of the probability of a vacancy within such year.

(*n*) The right of next presentation obviously remains transferable where it constitutes the whole interest of the transferor.

Prohibition as to sales of advowsons by auction.

invalid. The Act also provides (*o*) that it shall not be lawful to offer for sale by public auction any right of patronage, except in the case of an advowson to be sold in conjunction with any manor, or with an estate in land of not less than one hundred acres situate in the parish in which the advowson is situate, or in an adjoining parish and belonging to the same owner as the advowson.

Right of presentation pending completion of sale of an advowson.

Upon the sale of an advowson when the church is full, the legal right to present on the next vacancy remains with the vendor until the sale be completed by conveyance (*p*); but in equity the right of presentation belongs to the purchaser as from the date of the contract for sale, subject to the condition of his accepting the title. If, therefore, a vacancy occur before completion, the purchaser, having first accepted the title, may require the vendor to present to the living such person as the purchaser may select (*q*). But if the living became vacant by the promotion of the incumbent to the bishopric of a see in England, the Crown is entitled to present for that turn (*r*).

Devices formerly used on sale in expectation of a vacancy.

When an advowson or a next presentation was sold in expectation of an early avoidance of the living, various devices were resorted to in order to protect the purchaser in case the expected avoidance did not take place. Thus it was sometimes provided in the contract for sale that the purchase money should on completion be deposited with trustees to be paid over to the vendor if the vacancy occurred within a specified time, but

(*o*) Sect. 1 (2), whereby also any person offering any right of patronage for sale by auction in contravention thereof, or bidding at any such sale, is rendered liable on summary conviction to a fine not exceeding 100*l*.

(*p*) 17 Vin. Abr. Presentation, 319, pl. 11.

(*q*) *Fox* v. *Chester*, 3 Bli. N. S. 123, 155—157; *Nicholson* v. *Knapp*, 9 Sim. 326; *Dowling* v. *Maguire*, Ll. & G. t. Plunk. 1, 30; *Greenslade* v. *Dare*, 17 Beav. 502.

(*r*) *Grocers' Co.* v. *Archbp. of Canterbury*, 3 Wils. K. B. 214, 232, 233; *R.* v. *Eton College*, 8 E. & B. 610.

otherwise to be returned to the purchaser and the advowson to be reconveyed to the vendor (*s*). Or it was stipulated that the *vendor* should pay interest on the purchase money from the date fixed for completion until the benefice should become vacant (*t*); and such a stipulation was held not to be void as simoniacal on the sale of an advowson, where the vendor was not the incumbent (*u*). Or it was agreed that the vendor should re-purchase the advowson, if the living were not avoided within a certain time. But now, by the Benefices Act, 1898 (*x*), any agreement on the transfer of a right of patronage of a benefice either (i) for re-transfer of the right, or (ii) for postponing payment of any part of the consideration for the transfer until a vacancy or for more than three months, or (iii) for payment of interest until a vacancy or for more than three months, or (iv) for any payment in respect of the date at which a vacancy occurs, shall be invalid.

§ 7.—*Sale of Charity Lands.*

Charity lands.

On the sale of any hereditaments which are or have been subject to any charitable uses or trusts (*y*), there are two main points to be considered by the conveyancer advising on the title; first, whether the hereditaments were duly assured in accordance with Part II. of the Mortmain and Charitable Uses Act, 1888 (*z*), or the statutes now replaced by that enactment (*a*), to the

(*s*) Davidson, Prec. Conv. vol. ii. part i. 30, 35, 4th ed.

(*t*) Davidson, Prec. Conv. vol. ii. part i. 37, 41, 4th ed.; 1 Key & Elphinstone, Prec. Conv. 632, n., 4th edit.

(*u*) *Sweet* v. *Meredith*, 3 Giff. 610, 8 Jur. N. S. 637.

(*x*) Stat. 61 & 62 Vict. c. 48, s. 1 (3).

(*y*) As to what uses or trusts are charitable, see Tudor's Charitable Trusts, Chap. I.; 1 Jarm. Wills, 166, 5th ed.

(*z*) Stat. 51 & 52 Vict. c. 42, amended by 54 & 55 Vict. c. 73.

(*a*) Stats. 9 Geo. II. c. 36 (commonly called the Mortmain Act); 9 Geo. IV. c. 85; 24 & 25 Vict. c. 9; 25 & 26 Vict. c. 17; 27 & 28 Vict. c. 13; 29 & 30 Vict. c. 57; 31 & 32 Vict. c. 44; 34 & 35 Vict. c. 13; 35 & 36 Vict. c. 24.

charitable uses on which it is alleged that they are or were held; and secondly, whether any conveyance of such hereditaments agreed by the contract of sale to be made or purported to be made by any of the documents of title is or was subject to the restrictions imposed by the 29th section of the Charitable Trusts Amendment Act, 1855 (*b*), and if so, whether the conditions thereby imposed have been complied with. The first of these requirements must also be observed on the purchase of any hereditaments to be assured to any charitable uses. Besides which, if the title should comprise a conveyance to a *corporation* for charitable purposes, it must be ascertained that the same was made in conformity with the law of conveyance to a corporation into mortmain, now contained in Part I. of the Mortmain and Charitable Uses Act, 1888.

Requisites of the conveyance of land to charitable uses.

By Part II. of the Mortmain and Charitable Uses Act, 1888 (*c*), subject to the savings and exceptions in the Act contained, and to the amendments now made (*d*) as stated below with respect to assurances by will, every assurance (*e*) of land to or for the benefit of any charitable uses is void (*f*), unless made in accordance with the requirements of the Act. These are that the assurance must be made—(1) by deed (2) executed in the presence of at least two witnesses (3) twelve months at least before the assuror's death (*g*) and (4) enrolled in the Central Office of the Supreme Court within six months after the execution thereof; and (5) must be made to take effect in possession for the charitable use intended immediately from the

(*b*) Stat. 18 & 19 Vict. c. 124.

(*c*) Stat. 51 & 52 Vict. c. 42, s. 4.

(*d*) By stat. 54 & 55 Vict. c. 73; see p. 402, below.

(*e*) See, for the definition of this term, stat. 51 & 52 Vict. c. 42, s. 10.

(*f*) See *Churcher* v. *Martin*, 42 Ch. D. 312.

(*g*) Including in those twelve months the days of the making of the assurance and of the death.

making thereof, and (6) must, except as in the Act provided (*h*), be without any power of revocation, reservation, condition or provision for the benefit of the assuror or any person claiming under him. The first and second of these requirements do not apply to assurances of land of copyhold or customary tenure (*i*). The third requirement, whereby any assurance of land to any charitable uses may become void by reason of the assuror's death within a year after the execution thereof, is not imposed on assurances of land made in good faith for full and valuable consideration; and this is equally the case whether such consideration be actually paid upon or before the making of the assurance, or be reserved or made payable to the vendor or any other person by way of rent, rent-charge or other annual payment in perpetuity, or for any term of years or other period, with or without a right of re-entry

(*h*) By sect. 4 (4), the assurance, or any instrument forming part of the same transaction, may contain all or any of the following provisions; so, however, that they reserve the same benefits to persons claiming under the assuror as to the assuror himself, namely—

(i.) The grant or reservation of a peppercorn or other nominal rent;

(ii.) The grant or reservation of mines or minerals;

(iii.) The grant or reservation of any easement;

(iv.) Covenants or provisions as to the erection, repair, position, or description of buildings, the formation or repair of streets or roads, drainage or nuisances, and covenants or provisions of the like nature for the use and enjoyment as well of the land comprised in the assurance as of any other adjacent or neighbouring land;

(v.) A right of entry on non-payment of any such rent or on breach of any such covenant or provision;

(vi.) Any stipulations of the like nature for the benefit of the assuror, or any person claiming under him.

By sect. 4 (5), if the assurance is made in good faith on a sale for full and valuable consideration, that consideration may consist wholly or partly of a rent, rent-charge, or other annual payment reserved or made payable to the vendor, or any other person, with or without a right of re-entry for non-payment thereof: see also sect. 10 (iv.).

These enactments replace stat. 24 & 25 Vict. c. 9, s. 1 (passed 17th May, 1861), by which exceptions were first introduced to the rule of stat. 9 Geo. II. c. 36, that the assurance must be without any provision for the benefit of the grantor. This must not be forgotten in considering the effect of assurances to charitable uses made before that date.

(*i*) See stat. 51 & 52 Vict. c. 42, s. 4 (6).

Assurance by registered disposition under the Land Transfer Acts.

for non-payment thereof, or partly paid and partly reserved as aforesaid (*k*). Any assurance of land, which is by the Act required to be made by deed, may be made by a registered disposition under the provisions of the Land Transfer Acts, 1875 and 1897, and if so made shall be exempt from the requirements of the Act of 1888 as to execution in the presence of witnesses and as to enrolment (*l*). And enrolment is not required of an assurance of land to or for the benefit of any charitable uses, if those uses are declared by a separate instrument, but in such case that separate instrument must be enrolled in the Central Office within six months after the making of the assurance of the land (*m*). Where any such assurance or instrument has not been duly enrolled within the requisite time, the High Court of Justice, or the officer having control over the enrolment of deeds in the Central Office, is empowered to order or cause the same to be subsequently enrolled; but this power is only exercisable where the Court or officer is satisfied, first, that the omission to enrol in proper time has arisen from ignorance or inadvertence, or through the destruction or loss of the document (*n*); and, secondly, that the assurance was of a nature to be validated under the enabling enactment in that behalf. This provides that if the assurance to be validated was made in good faith and for full and valuable consideration, and was made to take effect in possession immediately from the making thereof without any power of revocation, reservation, condition, or provision, except such as is authorised by the Act (*o*), and if, at the time of the application for enrolment, possession or enjoyment

Enrolment of separate deed of trust.

Power to enrol instruments not enrolled within due time.

(*k*) See sects. 4 (7), 10 (iv.), replacing stats. 9 Geo. II. c. 36, s. 2; 27 & 28 Vict. c. 13, s. 4.

(*l*) Stat. 51 & 52 Vict. c. 42, s. 9.

(*m*) Stat. 51 & 52 Vict. c. 42, s. 4 (6), replacing 24 & 25 Vict. c. 9, s. 2.

(*n*) In such case some copy or abstract thereof, or some subsequent instrument by which the trusts sufficiently appear, may be enrolled.

(*o*) Above, p. 395, n. (*h*).

was held under the assurance, then such subsequent enrolment shall have the same effect as if it had been made within the requisite time; but such subsequent enrolment shall not give any validity to the assurance if at the time of such application any proceeding for setting aside the assurance or for asserting any right founded on the invalidity of the assurance is pending, or any decree or judgment founded on such invalidity has been obtained (*p*). Where an assurance of land to any charitable uses has not been executed in the presence of two witnesses, or has otherwise failed to comply with the requirements of the Act, except only in respect of want of due enrolment, there is no power subsequently to amend the defect and the assurance remains altogether void (*q*). And an assurance failing to comply with the requirements of the Act is equally void whether the intended charitable uses or trusts appear from the assurance itself, from some separate instrument or from other circumstances; so that if the trustees of a charity buy land with money belonging to the charity and take a conveyance to themselves, not disclosing their trust, the conveyance will be void unless made in accordance with the Act. And it must not be forgotten that conveyances of land to a charity for valuable consideration are void, as well as voluntary conveyances, if not made in accordance with the statutory requirements (*r*). If, however, the grantees under any assurance which is void for non-compliance with the present or former Mortmain Act (*s*) should have entered into possession of the land purported to be thereby assured, and re-

No power to amend other defects than want of enrolment.

The assurance will be void though the charitable trusts be not disclosed.

(*p*) Stat. 51 & 52 Vict. c. 42, s. 5, replacing 35 & 36 Vict. c. 24, s. 13; 29 & 30 Vict. c. 57.

(*q*) See *Wickham* v. *Bath*, L. R. 1 Eq. 17; *Webster* v. *Southey*, 36 Ch. D. 9.

(*r*) See *Doe* d. *Wellard* v. *Hawthorn*, 2 B. & A. 96, 101—103; *Doe* d. *Preece* v. *Howells*, 2 B. & Ad. 744; *A.-G.* v. *Gardner*, 2 De G. & S. 102; *A.-G.* v. *Munro*, *ib.* 122; *Bunting* v. *Sargent*, 13 Ch. D. 330; *Webster* v. *Southey*, 36 Ch. D. 9.

(*s*) Above, p. 393, notes (*z*, *a*).

The charity may gain title under the Statutes of Limitation.

To what interests in land the Act extends.

mained in such possession long enough for the assuror's title to be extinguished under the Statutes of Limitation (*t*), they will have a good title to the land (*u*). The above-mentioned restrictions of the Mortmain and Charitable Uses Act, 1888 (*x*), and the Mortmain Act of George II. (*y*) were imposed on the assurance to any charitable uses not only of land, but also of any tenements or hereditaments, corporeal or incorporeal, of whatsoever tenure, *and any estate or interest therein.* This had the effect of prohibiting the assurance to such uses, except in conformity with the statutory requirements, of money secured by mortgage of land and other property commonly called impure personalty (*z*). But now by the Mortmain and Charitable Uses Act, 1891 (*a*), the provisions of the Act of 1888, relating to the assurance of land to charitable uses, apply only to land and tenements and hereditaments, corporeal or incorporeal, of any tenure, and no longer extend to money secured on land or other personal estate arising from or connected with land. By the Act of 1888, as by that of George II., every assurance (*b*) of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, was subjected to the like restrictions as were thereby imposed on the assurance of land to such uses (*c*); but with respect to the assurance by will of personal estate for such purposes, the law is now altered by the Act of 1891 (*d*) as stated below.

Assurance of personal estate to be laid out in purchase of land for a charity.

(*t*) Stats. 3 & 4 Will. IV. c. 27; 37 & 38 Vict. c. 57.

(*u*) See *A.-G.* v. *Gardner*, 2 De G. & S. 102; *A.-G.* v. *Munro*, *ib.* 122; *Churcher* v. *Martin*, 42 Ch. D. 312.

(*x*) Stat. 51 & 52 Vict. c. 42, s. 10 (iii.).

(*y*) Stat. 9 Geo. II. c. 36.

(*z*) See Wms. Pers. Prop. 443, 444, 15th ed.; 1 Jarm. Wills, 177, 5th ed.

(*a*) Stat. 54 & 55 Vict. c. 73, s. 3.

(*b*) See above, p. 394, n. (*e*).

(*c*) Except that the transfer of stock in the public funds for such purposes is not required to be made by deed executed in the presence of two witnesses or to be enrolled, and remains valid unless the transferor die within *six* months thereafter: stat. 51 & 52 Vict. c. 42, s. 4.

(*d*) Stat. 54 & 55 Vict. c. 73, s. 7; see p. 403, below.

Exemptions from the requirements of the Mortmain Acts.

Part III. of the Mortmain and Charitable Uses Act, 1888, makes the following exemptions from the provisions of Part II. of the Act:—

(1.) An assurance of land, or personal estate to be laid out in the purchase of land, to or in trust for any of the Universities of Oxford, Cambridge, London, Durham, and the Victoria University, or any of the colleges or houses of learning within any of those Universities, or to or in trust for any of the Colleges of Eton, Winchester, and Westminster, for the better support and maintenance of the scholars only upon the foundations of those last-mentioned colleges, or to or in trust for the warden, council, and scholars of Keble College (*e*).

(2.) An assurance, otherwise than by will, to trustees on behalf of any society or body of persons associated together for religious purposes or for the promotion of education, art, literature, science, or other like purposes, of land not exceeding two acres for the erection thereon of a building for such purposes, or any of them, or whereon a building used or intended to be used for such purposes, or any of them, has been erected, so that the assurance be made in good faith for full and valuable consideration (*f*).

(3.) An assurance by deed of land of any quantity or an assurance by will of land of the quantity therein mentioned (*g*) for the purposes only of

(*e*) Stat. 51 & 52 Vict. c. 42, s. 7 (i.), replacing 9 Geo. II. c. 36, s. 4, except as to London, Durham and Victoria Universities and Keble College: see Tudor's Charitable Trusts, 426—428, 3rd ed.

(*f*) Stat. 51 & 52 Vict. c. 42, s. 7 (ii.), replacing 31 & 32 Vict. c. 44, s. 1. Such assurance may, however, be enrolled, if thought fit.

(*g*) Not exceeding twenty acres for any one public park, two acres for any one public museum, and one acre for any one school-house: stat. 51 & 52 Vict. c. 42. s. 6 (3).

a public park, a school-house for an elementary school, a public museum (*h*), or an assurance by will of personal estate to be applied in or towards the purchase of land for all or any of the same purposes only; provided that a will containing such an assurance, and a deed containing such an assurance and made otherwise than in good faith for full and valuable consideration, must be executed not less than twelve months before the death of the assuror, or be a reproduction in substance of a devise made in a previous will in force at the time of such reproduction, and which was executed not less than twelve months before the death of the assuror, and must be enrolled in the books of the Charity Commissioners within six months after the death of the testator, or in case of a deed the execution of the deed (*i*).

(4.) Where by any statute in force any provision repealed by the Act of 1888 is excluded either wholly or partially from application or is applied with modification, in every such case the corresponding provision of that Act shall be excluded or applied in like extent or manner (*k*). This refers to the cases in which exemption from all or some of the restrictions imposed by the Mortmain Act of George II. has been granted by statute in favour either

(*h*) See s. 6 (4) for the definition of these terms.

(*i*) Stat. 51 & 52 Vict. c. 42, s. 6, replacing 34 & 35 Vict. c. 13, and also exempting the assurances therein mentioned from the operation of Part I. of the Act: see above, p. 394.

By stat. 55 Vict. c. 11, this exemption is extended to any assurance by deed of land to a local authority for any purpose for which such authority is empowered by any Act of Parliament to acquire land, without the requirement that an assurance not made for full valuable consideration must be executed not less than twelve months before the assuror's death.

(*k*) Stat. 51 & 52 Vict. c. 42, s. 8.

of particular charitable institutions or bodies or of assurances for certain particular purposes (*l*).

Besides these exemptions, it was considered that the Mortmain Act of George II. (*m*) had no application in case of land, which was already in mortmain by reason of its being lawfully vested in a corporation; and it was decided on this ground that the conveyance of land to charitable uses by an ecclesiastical or an eleemosynary corporation was not subject to any of the restrictions

(*l*) See Tudor's Charitable Trusts, 429—439, 3rd ed.; 1 Jarm. Wills, 202—204, 5th ed.; Index to Statutes, Mortmain, 2, 3. With regard to particular charitable institutions specially authorized by statute to take lands, where these are corporations, it must be considered whether they are exempted from the provisions of Part I. only of the Mortmain and Charitable Uses Act, 1888 (above, p. 394), or whether they have been granted a dispensation from the restrictions imposed by Part II. of the Act: see *Nethersole* v. *School for Indigent Blind*, L. R. 11 Eq. 1; *Chester* v. *Chester*, L. R. 12 Eq. 444; cf. *Perring* v. *Trail*, L. R. 18 Eq. 88. As to assurances for particular charitable purposes, there are numerous instances in which the Legislature has exempted the assurance of land or of limited quantities of land for objects regarded as laudable from all or some of the requirements of Part II. of the Act of 1888, and also from the provisions of Part I. of the Act. Amongst these are the augmentation of benefices, the building of churches (see Tudor's Charitable Trusts, 434 *sq.*, 3rd ed.), the provision of public recreation grounds (stat. 22 Vict. c. 27), and of dwellings for the working classes in populous places (stat. 53 & 54 Vict. c. 16), and the acquisition of land by institutions for promoting technical and industrial instruction and training (stat. 55 & 56 Vict. c. 29, s. 10). Other instances, in which also tenants for life or other limited owners are empowered to convey the whole estate in the land for the charitable purpose in question are the provision of sites for schools (stats. 4 & 5 Vict. c. 38; 7 & 8 Vict. c. 37; 12 & 13 Vict. c. 49; 14 & 15 Vict. c. 24; 15 & 16 Vict. c. 49), for literary, scientific and like institutions (stat. 17 & 18 Vict. c. 112), and for places of worship or burial (stats. 30 & 31 Vict. c. 133; 36 & 37 Vict. c. 50; 45 & 46 Vict. c. 21). Also, by stat. 33 & 34 Vict. c. 34, the investment on mortgage of land of any money held by any corporation or trustees for any public or charitable purpose is exempted from the restrictions now contained in Part II. of the Mortmain Act of 1888, and also from any forfeiture for alienation of land into mortmain: but in every case in which the equity of redemption of the premises comprised in any such security shall become liable to foreclosure or otherwise barred or released, the same shall thenceforth be held in trust to be sold and converted into money, and shall be sold accordingly; and in any proceedings for redeeming or enforcing such security the decree shall direct (in default of redemption) a sale and not foreclosure.

(*m*) Stat. 9 Geo. II. c. 36.

imposed by that Act (*n*). And following the spirit of these decisions, it was further held that, when land had been once duly assured into mortmain by reason of its having been vested in trustees for charitable purposes, the conveyance thereof to other trustees or to another charity did not fall within the purview of the same Mortmain Act, and needed not to be made with any of the formalities therein prescribed (*o*). And as the Mortmain and Charitable Uses Act, 1888 (*p*), is mainly a Consolidation Act (*q*), it is thought that the exemptions so established apply equally under the present law.

Gift of land by will to a charity.

The Mortmain Acts obviously prohibited the gift by will to a charity of any interest in land (*r*). But by the Mortmain and Charitable Uses Act, 1891 (*s*), land may be assured by will to or for the benefit of any charitable use. In such case, however, the land is, as a rule, required to be sold within one year from the death of the testator, or such extended period (*t*) as

(*n*) *Walker* v. *Richardson*, 2 M. & W. 882; *A.-G.* v. *Glyn*, 12 Sim. 84.

(*o*) *Ashton* v. *Jones*, 28 Beav. 460.

(*p*) Stat. 51 & 52 Vict. c. 42: see the title.

(*q*) Consolidation Acts, which are Acts passed for the purpose of expressing existing *statute* law in a new form, are construed on principles different from those which govern the construction of statutes enacting new law or codifying the existing common or judge-made law. Thus the provisions of Consolidation Acts are considered to be retrospective, contrary to the general rule applicable to other statutes: *Ex p. Todd*, 19 Q. B. D. 186, 195, 199; they are construed with reference to the state of law which existed at the time when the enactments consolidated were originally passed: *Mitchell* v. *Simpson*, 25 Q. B. D. 183; and their construction will be determined by the cases decided upon the construction of the original enactments: *Re Budgett*, 1894, 2 Ch. 557; *Re Pickard*, 1894, 3 Ch. 704; *Norton* v. *Davison*, 1899, 1 Q. B. 401; *The Heather Bell*, 1901, P. 143, 272.

(*r*) Above, p. 394.

(*s*) Stat. 54 & 55 Vict. c. 73 (passed 5th August, 1891), s. 5; see *Re Bridger*, 1894, 1 Ch. 297; *Re Hume*, 1895, 1 Ch. 422. The Act only applies to wills of testators dying after the passing thereof (sect. 9), and is not to limit or affect the exemptions contained in Part III. of the Mortmain and Charitable Uses Act, 1888 (above, p. 399), or to apply to any land or personal estate to be laid out in the purchase of land acquired under any assurance to which such exemptions or any of them apply (sect. 10).

(*t*) See *Re Sidebottom*, 1901, 2 Ch. 1.

may be determined by the High Court, a Judge thereof at chambers, or the Charity Commissioners (*u*); and if such time shall expire without completion of the sale of the land, it shall forthwith vest in the official trustee of charity lands, and the Charity Commissioners shall take all necessary steps for the sale or the completion of the sale thereof (*v*). And the assurance by will of any personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses is no longer rendered void; for the Act provides that any personal estate so assured shall be held to or for the benefit of the charitable uses specified as though there had been no direction to lay it out in the purchase of land (*x*). But the High Court, a Judge thereof at chambers, or the Charity Commissioners may, if satisfied that any land assured by will to or for the benefit of any charitable uses or proposed to be purchased out of personal estate by will directed to be laid out in the purchase of land is required for actual occupation for the purposes of the charity, and not as an investment, by order sanction the retention or acquisition, as the case may be, of such land (*y*). As we have seen (*z*), the Act also exempted money secured on land or other personal estate arising from or connected with land from the requirements of the Act of 1888 (*a*), thus allowing for the future the bequest to charities of impure personalty. It has been held that, where land is devised to trustees on trust to sell the same and hand over the proceeds of the sale to a charity, the bequest to the charity is of personal estate arising from land, and the case is governed by the last mentioned provision of the Act of 1891, and not by the provisions (*b*) relating to the devise of land

(*u*) See note (*s*), above.
(*v*) Sect. 6; *Re Ryland*, 1903, 1 Ch. 467.
(*x*) Sect. 7; see *Re Sutton*, 1901, 2 Ch. 640.
(*y*) Sect. 8; see *Re Ryland*, 1903, 1 Ch. 467, 474.
(*z*) Above, p. 398.
(*a*) Sect. 3.
(*b*) Sects. 5, 6, 8, above.

to or for the benefit of any charitable use. In such case, therefore, the land is not required to be sold within a year after the testator's death; and the time for exercising the trust for sale is decided by the rules generally applicable to such trusts (*c*); but the trustees are bound to sell within a reasonable time, and cannot, with the consent of the charity, postpone the sale indefinitely (*d*).

Restriction on the sale, mortgage, or leasing of charity lands.

By sect. 29 of the Charitable Trusts Amendment Act, 1855 (*e*), it shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of Parliament, under any Act already passed or which may hereafter be passed, or of a Court or Judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the Board of Charity Commissioners, any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion after more than three years of any existing term, or for any term of life, or in consideration wholly or in part

(*c*) Above, p. 268.

(*d*) *Re Wilkinson*, 1902, 1 Ch. 841; *Re Sidebottom*, 1902, 2 Ch. 389; see also *Re Ryland*, 1903, 1 Ch. 467.

(*e*) Stat. 18 & 19 Vict. c. 124, passed 14th August, 1855. According to the previous law the alienation of charity lands was not absolutely prohibited, but was liable to be set aside if not provident and beneficial to the charity. And a sale or other alienation of charity lands might well be made under the direction of the Court of Chancery, or by the trustees of a charity acting under express powers conferred by the author of the trust. But if a sale or other disposition of charity lands were made by the trustees without the authority of the Court or any such express powers, the burden lay on the purchaser or other person taking under the disposition of proving that the transaction was provident and beneficial to the charity; and if he failed to establish this the disposition would be set aside, unless the defence of purchase for value without notice of the trust or of the Statute of Limitations could be maintained. See *A.-G.* v. *Warren*, 2 Swanst. 291, 302; *A.-G.* v. *Hungerford*, 2 Cl. & Fin. 357; *A.-G.* v. *Brettingham*, 3 Beav. 91; *A.-G.* v. *South Sea Co.*, 4 Beav. 453; *Magdalen College, Oxford* v. *A.-G.*, 6 H. L. C. 189, 205, 213; *Re Ashton Charity*, 22 Beav. 288; *Re Clergy Orphan Corp.*, 1894, 3 Ch. 145, 154; *Re Mason's Orphanage and London and North Western Rail. Co.*, 1896, 1 Ch. 54, 59, 603, 604.

of any fine, or for any term of years exceeding twenty-one years. It is held that this enactment absolutely prohibits any disposition of charity lands in contravention of the restrictions thereby imposed (*f*); and any such disposition is altogether void (*g*). And it has been held that the expressions in the Act authorising alienation under a scheme legally established relate only to schemes for the administration of charities made under the jurisdiction in that behalf inherited by the High Court from the Court of Chancery or conferred by the Charitable Trusts Acts (*h*); so that the trustees of charities are no longer at liberty to exercise express powers of alienation conferred on them by the author of the trust, except in accordance with the restrictions of the Act of 1855 (*i*). The word "charity" in this Act includes every institution in England or Wales endowed for charitable purposes, but not any charity or institution expressly exempted from the operation of the Charitable Trusts Act, 1853; and the Act of 1855 does not extend to any case excepted by sect. 62 of the Act of 1853 from the operation thereof (*k*). These exceptions are stated in the note (*l*), and regard must of

(*f*) *Re Mason's Orphanage, &c.*, 1896, 1 Ch. 54, 596; *Fell* v. *Official Trustee of Charity Lands*, 1898, 2 Ch. 44.

(*g*) *Bangor* v. *Parry*, 1891, 2 Q. B. 277.

(*h*) See Tudor's Charitable Trusts, 88 *sq.*, 128, 132, *sq.*, 3rd ed.; stats. 16 & 17 Vict. c. 137, ss. 28, 29, 32, 43; 23 & 24 Vict. c. 136, s. 2.

(*i*) *Re Mason's Orphanage, &c.*, 1896, 1 Ch. 54, 596.

(*k*) Stat. 18 & 19 Vict. c. 124, ss. 47, 48.

(*l*) By sect. 62 of the Charitable Trusts Act, 1853, this Act shall not extend to—

(1) The Universities of Oxford, Cambridge, London or Durham, or any college or hall in the said Universities of Oxford, Cambridge and Durham; or to

(2) Any cathedral or collegiate church; or to

(3) Any building registered as a place of meeting for religious worship with the Registrar-General of Births, Deaths or Marriages in England or Wales, and *bonâ fide* used as a place of meeting for religious worship (see stats. 18 & 19 Vict. c. 81, s. 9; 32 & 33 Vict. c. 110, s. 15); or to

(4) The Commissioners of Queen Anne's Bounty; or to

(5) The British Museum; or to

(6) Any friendly or benefit society or savings bank; or to

course be had to them in advising on the title to any land sold by charity trustees.

(7) Any institution, establishment, or society for religious or other charitable purposes, or the auxiliary or branch associations connected therewith, *wholly maintained by voluntary contributions;* or to

(8) Any bookselling or publishing business carried on by or under the direction of any society wholly or partially exempted from this Act, so far as such business is or shall be carried on by means of voluntary contributions only, or the capital or stock of such business; and

(9) Where any charity is *maintained partly by voluntary subscriptions and partly by income arising from any endowment*, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the Board of Charity Commissioners or the powers or provisions of this Act; and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said Board or the powers or provisions of this Act; and

(10) Nothing in this Act shall subject the funds or property of any missionary or other similar society, or the missionaries, teachers, or officers of such society, or of any branch thereof, which funds or property shall not be within the limits of England or Wales, to the jurisdiction of the said Board:

Provided always, that the said exemption shall not extend to any cathedral, collegiate, chapter, or other schools. See also sect. 66.

It has been held that, by charities wholly maintained by voluntary contributions, it is intended to describe charities which have no invested endowment yielding an income for their support, but are dependent on the gifts of the benevolent, whether recurrent or occasional, and whether *inter vivos* or by will. With regard to charities maintained partly by voluntary subscriptions and partly by income arising from any endowment, it has been held that the income of any endowment *primâ facie* means income derived from any invested funds; that in the case of such charities, bequests and donations for the general purposes of the charity, which may be lawfully applied as income consistently with the terms of the gift, are exempt from the operation of the Acts; and that such gifts and the

Dispositions of charity lands by authority of the Charity Commissioners.

Under the Charitable Trusts Act, 1853 (*m*), the Charity Commissioners may authorise the sale, exchange, mortgage (*n*), or leasing of charity lands, where advantageous to the charity; and leases, sales, exchanges, and other transactions so authorised shall have the like effect and validity as if they had been authorised by the express terms of the trust affecting the charity (*o*). Thus, where express powers of alienation have not been conferred on the trustees of charity lands, the Charity Commissioners may authorise provident dispositions thereof (*p*); and where such express powers have been conferred, the approval of the Charity Commissioners is generally necessary to their exercise (*q*). Where the title to any land sold depends on any disposition of charity lands, to which the authority or approval of the Charity Commissioners is necessary, the order of the Commissioners giving such authority or approval should be abstracted and produced; and if this be not done, the order should be inquired for, and in default of the production of such an order, objection should be taken to the title. The order of the Charity Commissioners

income thereof are not brought within the operation of the Acts by being invested, even in the purchase of land. So that in the case of the last-mentioned charities, land bought by the trustees with the produce of such gifts can be disposed of without the consent of the Charity Commissioners, and, further, appears to be alienable by the trustees at their discretion without subjecting the purchaser to the burden of proving that the alienation was beneficial to the charity; above, p. 404, n. (*e*); see *Re Clergy Orphan Corporation*, 1894, 3 Ch. 145, 150, 154; *Royal Society of London and Thompson*, 17 Ch. D. 407; *Finnis to Forbes*, 24 Ch. D. 587, 591; *Re Gilchrist Educational Trust*, 1895, 1 Ch. 367; *Re Stockport, &c. Schools*, 1898, 2 Ch. 687; see also *Corporation of Sons of Clergy and Skinner*, 1893, 1 Ch. 178; *sed quære* whether this case is consistent with *Re Mason's Orphanage, &c.*, 1896, 1 Ch. 54, 596.

(*m*) Stat. 16 & 17 Vict. c. 137, ss. 21, 24.

(*n*) See also stats. 18 & 19 Vict. c. 124, s. 30; 23 & 24 Vict. c. 136, s. 15.

(*o*) Stat. 16 & 17 Vict. c. 137, s. 26.

(*p*) The jurisdiction of the High Court to authorise such dispositions (above, p. 404, n. (*e*)) remains; but under the Charitable Trusts Act, 1853, no application can be made to the Court for such purpose without the certificate of the Charity Commissioners: stat. 16 & 17 Vict. c. 137, s. 17.

(*q*) Above, p. 405.

authorising a disposition of charity lands does not of course operate as a conveyance of the legal estate therein; that must be duly assured in order to give effect to the disposition authorised (*r*). Such assurance may be made either by the person or all the persons seised of the legal estate, or else under sect. 12 of the Charitable Trusts Act, 1869 (*s*), providing that, where the trustees or persons acting in the administration of any charity have power to determine on any sale, exchange, partition, mortgage, lease, or other disposition of any property of the charity, a majority of those trustees or persons who are present at a meeting of their body duly constituted and vote on the question shall have and be deemed to have always had full power to execute and do all such assurances, acts and things as may be requisite for carrying any such sale, exchange, partition, mortgage, lease, or disposition into effect, and all such assurances, acts and things shall have the same effect as if they were respectively executed and done by all such trustees or persons for the time being and by the official trustee of charity lands. This section appears to be applicable where the power of determining on a sale or other disposition of the charity lands has been conferred on the trustees by order of the Charity Commissioners; and it enables the majority of the trustees to convey the legal estate in the land, whether the same be vested in the whole number of trustees or in the official trustee of charity lands (*t*). But where the title to any land sold depends on an assurance executed under this section, proof must be given that the persons who executed the same were the majority of those present at a meeting of their body duly constituted and voting on the question (*u*).

(*r*) Mortgagees of charity lands, however, are generally satisfied with the provision for repayment made by the Charity Commissioners' Order: see Tudor's Charitable Trusts, 486, 487, 3rd ed.

(*s*) Stat. 32 & 33 Vict. c. 110.

(*t*) See stats. 16 & 17 Vict. c. 137, ss. 47—50; 18 & 19 Vict. c. 124, s. 15.

(*u*) 1 Dart, V. & P. 329.

As the Charitable Trusts Act, 1869 (*x*), is to be construed as one with the Charitable Trusts Acts, 1853 and 1855, it does not appear to apply in cases excepted from the operation of these Acts (*y*). In such cases, therefore, all persons seised of the legal estate in the charity lands must concur in executing any assurance thereof. Where any land sold has been held by a succession of charity trustees, of course the appointments of any new trustee and the conveyances consequent on such appointment form part of the title, and must be abstracted and produced accordingly. Under the Trustees Appointment Acts, 1850 to 1890 (*z*), lands held in trust for certain religious or educational purposes vest in new trustees duly appointed, or in such new trustees together with the continuing trustees, without any express conveyance for the purpose.

§ 8.—*Partnership Property.*

Partnership property.

Where a purchaser has notice that any land sold is or has been partnership property, he must ascertain that the same has been or shall be duly assured, not only by all persons seised of the legal estate therein, but also by all persons interested therein in equity under the agreement of partnership (*a*). As is well known, when any land becomes partnership property, the legal estate therein devolves according to the general law applicable to land of the like nature and tenure: but in equity the land is held in trust for the partners, who are entitled

(*x*) Stat. 32 & 33 Vict. c. 110, s. 3.

(*y*) Above, p. 405, and n. (*l*).

(*z*) Stats. 13 & 14 Vict. c. 28; 32 & 33 Vict. c. 26; 53 & 54 Vict. c. 19.

(*a*) See *Cavander* v. *Bulteel*, L. R. 9 Ch. 79, where the defendants, having taken from one Bewlay a mortgage of land, of which at law he was solely seised in fee, but which in equity belonged to him and the plaintiff as partners, were held to have had constructive notice of the firm's title, because they were aware that the business of the firm was carried on there. And see above, pp. 249 *sq.*

thereto, as between themselves and their representatives, as personal estate (*b*). The devolution at law of real estate, which is partnership property, varies, of course, according as it has been dealt with. It may have been conveyed to the partners or some of them only, as joint tenants in fee or as tenants in common, or to one partner only in fee, or it may have been vested in trustees, none of whom were partners. But in whatever form the conveyance was taken, the subsequent devolution of the legal estate is to be traced according to the general rules governing the devolution of real estate held upon trust (*c*). Prior to the year 1882, therefore, if a person (whether a partner or not) were solely seised in fee of land held in equity as partnership property, the legal estate passed, on his death, to his heir or devisee: but the heir or devisee was held to be a trustee for the persons entitled under the partnership agreement (*d*). Since the end of the year 1881, it appears that, in the same circumstances, the legal estate passes to the deceased tenant's personal representatives under the Conveyancing Act of 1881 (*e*). As regards the persons, who should

(*b*) See stat. 53 & 54 Vict. c. 39, ss. 20—22; *Darby* v. *Darby*, 3 Drew. 495; *Waterer* v. *Waterer*, L. R. 15 Eq 402; *A.-G.* v. *Hubbuck*, 13 Q. B. D. 275.

(*c*) Land, which is partnership property, is in effect held upon trust for sale and conversion into money and application of the proceeds of the sale, first, in discharging the partnership liabilities and subject thereto in dividing the same between the partners in proportion to their interests: *Darby* v. *Darby*, 3 Drew. 495; *A.-G.* v. *Hubbuck*, 10 Q. B. D. 488, 13 Q. B. D. 275, 289; stat. 53 & 54 Vict. c. 39, ss. 20 (2), 22, 44.

(*d*) *Broom* v. *Broom*, 3 My. & K. 443; *West of England, &c. Bank* v. *Murch*, 23 Ch. D. 138; above, p. 180.

(*e*) Stat. 44 & 45 Vict. c. 41, s. 30; above, p. 182. It is submitted that the cases cited in the two preceding notes establish that the estate, even when vested in a partner or in all the partners, is held upon a trust within the meaning of this enactment. Where land has been vested in partners as joint tenants in fee, but as part of their partnership estate (see 1 Key & Elph. Prec. Conv. 438, 4th ed.; 412, 7th ed.), or as tenants in common in equal shares, the case of *Re Selous*, 1901, 1 Ch. 921, may perhaps be thought to raise a doubt whether the partners can have different interests in the land in equity from what they have at law. In that case, one who was a trustee of leaseholds for two ladies in equal shares, by deed reciting that they had

concur in a disposition of land, which is partnership property, as being entitled under the partnership agree-

requested him to execute to them such assignment thereof as was thereinafter expressed, assigned the same to them as joint tenants, and they jointly covenanted to indemnify him against the rent and lessee's covenants. On the death of one of the ladies her executors claimed her share on the ground that in equity the ladies had remained tenants in common. Farwell, J., decided against this claim, holding that the case came within the rule in *Selby* v. *Alston*, 3 Ves. 339, that where equitable and legal estates, equal and co-extensive, unite in the same person, the former merges, or in other words, that a person cannot be a trustee for himself. He said: "The only doubt I felt was whether the advantage of a tenancy in common over a joint tenancy raised any presumption against merger. But the difference in interest between these two estates is *so small and shadowy* that I do not think it would be sufficient to raise that presumption. I hold that two or more persons cannot be trustees for themselves for an estate co-extensive with their legal estate." It is respectfully submitted that the learned judge rightly rejected the executors' claim, but for the wrong reasons. The deed of assignment was a conveyance by a trustee under a simple trust, who had been requested by his *cestui que trusts* to execute the estate to them. In such conveyance the limitation of the estate was expressly made to the *cestui que trusts* as joint tenants at their own request; their intention to take as such was plainly evidenced by the deed which they executed themselves. Why, then, should there be any equity to preserve their estate in common contrary to their expressed intention? (See *Foukes* v. *Pascoe*, L. R. 10 Ch. 343.) Suppose, however, that they had taken the assignment to themselves jointly on trust as to one moiety for the one and as to the other moiety for the other, or, which is the same thing, on trust for themselves as tenants in common in equal shares. Would the Court then have rejected the executors' claim? I think not. It is respectfully submitted that the learned Judge's *dictum* as to the difference between joint tenancy and tenancy in common being small and shadowy was an incautious utterance. There is nothing to prevent a man from being a trustee for himself and others, or from being one of several trustees for himself. If lands are conveyed to the use of A. and B. in fee as joint tenants on trust for them in fee in equal shares, each undivided moiety is, in equity, held by a several title: see Litt. s. 292. At law A. and B. are joint tenants in fee; each is therefore seised of the whole. But in equity A. and B. have no interest in each other's shares; each has a several title to one half only. In all except unity of possession the case is the same as if two separate pieces of land had been assured to the use of A. and B. in fee on trust, as to one for A. in fee, and as to the other for B. in fee. How, then, can it possibly be maintained that their estates in equity are co-extensive and commensurate with their estates in law? And where the equitable estate is not commensurate with the legal estate in the same person, there is no merger: see *Brydges* v. *Brydges*, 3 Ves 120, which was not cited in *Re Selous*. The rule in *Selby* v. *Alston* has never been supposed to apply to land assured to the use of partners in fee as part of their partnership estate; and the case of *Re Selous* certainly affords no good reason why the construction previously placed on such assurances should be in any way disturbed. The interest which the partners take in equity by reason of their interest in the partnership is altogether different from that which they have by reason of their tenancy at law:

ment, it is to be observed, first, that one partner has no general authority arising from the relation of partnership to bind the firm or the other partners by deed or to execute a deed on their behalf (*f*); and, secondly, that one partner may, it seems, make an equitable mortgage of the firm's land to secure the firm's debt (*g*); but, except where the ordinary business of the firm is to sell land (*h*), he has no general authority arising out of the relation of partnership to sell the firm's land (*i*). All dispositions, therefore, required by law to be made by deed of a partnership firm's estate or interest in any land must be executed by all the partners either personally or by attorney acting under an express power of attorney given by deed; and except in the case of an equitable mortgage to secure the firm's debt or a sale or lease by a firm whose ordinary business it is to sell or let land, all dispositions of the firm's equitable interest in any land, which is partnership property, must be made by all the partners; as, for instance, a contract for the sale or letting of the land where the business is carried on. After the dissolution of a partnership, whether by death or otherwise, the authority of each partner to bind the firm continues, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of the dissolution, but

see note (*e*) above. And it is contrary to the principles of equity that an equitable interest in any property, which interest has become vested in the legal or equitable owner of the property, but is not of exactly the same nature as his ownership, shall merge in the ownership if it were not intended that such merger should take place: see *Forbes* v. *Moffatt*, 18 Ves. 384; *Adams* v. *Angell*, 5 Ch. D. 634; *Re Pride*, 1891, 2 Ch. 135; *Minter* v. *Carr*, 1894, 3 Ch. 498; *Thorne* v. *Cann*, 1895, A. C. 11; *Ingle* v. *Vaughan Jenkins*, 1900, 2 Ch. 368; *Thellusson* v. *Liddard*, ib. 635.

(*f*) *Harrison* v. *Jackson*, 7 T. R. 207; *Steiglitz* v. *Egginton*, Holt, 141.

(*g*) See *Re Clough*, 31 Ch. D. 324; Lindley on Partnership, 152, 6th ed.; Pollock on Partnership, 30, 7th ed.

(*h*) See stat. 53 & 54 Vict. c. 39, ss. 5, 6.

(*i*) See *Butchart* v. *Dresser*, 10 Hare, 453, 456, 4 De G. M. & G. 542.

not otherwise: provided that the firm is in no case bound by the acts of a partner who has become bankrupt (*k*). It has been held that the survivor of two partners may make a good equitable mortgage by deposit of the title deeds of the firm's land to secure a firm debt (*l*). But it does not appear that the continuing authority of a surviving or other partner, to bind the firm after a dissolution, can warrant a sale by him of the firm's land, except where one partner alone could have made a valid sale of the land before the dissolution. On a sale of partnership land, therefore, made after a dissolution of partnership, the purchaser, besides getting in the legal estate as above mentioned, should require all the partners, or the personal representatives of such of them as are dead, to concur in the sale as regards their equitable interests in the land (*m*).

§ 9.—*Sale by Order of the Court.*

Title under an order for sale made by the Court.

Where the title to any land sold depends on an order for sale made by the Court (*n*), the principal points, on

(*k*) Stat. 53 & 54 Vict. c. 39, s. 38.

(*l*) *Re Clough*, 31 Ch. D. 324.

(*m*) See *Butchart* v. *Dresser*, 10 Hare, 453, 456, 4 De G. M. & G. 542, 544; *West of England, &c. Bank* v. *Murch*, 23 Ch. D. 138, where on a sale of partnership land, which had been vested at law in two partners as tenants in common, by the surviving partner and the devisee and executrix of the deceased partner, it was held that the person so seised of the deceased partner's estate had power, as his executrix, to sell his share, and was the proper person to join in receiving the purchase money. It has been said that where land has been conveyed to partners as joint tenants, the surviving partner can sell the same: 1 Dart, V. & P. 94, relying on *Fox* v. *Hanbury*, Cowp. 445, which applies only to the sale of goods; Lindley on Partnership, 350, 6th ed., citing an American case of *Shanks* v. *Klein*, 14 Otto, 18, where the point seems indeed to have been decided generally, although in the particular case the partners had dealt largely in the purchase and sale of real estate. To support this position it seems necessary to maintain that, since partnership lands are in fact held on trust for sale after a dissolution (above, p. 410, n. (*c*)), a surviving partner can execute this trust alone, although during the partnership he had no authority to sell. It is submitted that it would not be safe to accept a title in reliance on this doctrine, without an express decision of the English Court to this effect.

(*n*) As to sales of land by the

See addenda vol 2,

which the purchaser's advisers must satisfy themselves, are these: first, that the whole legal estate in the land has been conveyed to the person asserting title under the order, or will be conveyed to the purchaser, either by the assurance of all persons interested therein or by vesting order; secondly, that the order for sale was duly made and properly carried out, or if not, that the defect is one which may be disregarded in reliance on sect. 70 of the Conveyancing Act of 1881 (*o*); and thirdly, that all persons interested in the property sold for any equitable estate or interest were or are either parties to or otherwise bound by the proceedings in which the order for sale was made; or if not, that all estates or interests of all persons not so bound have been or will be expressly assured to the person asserting title under the order or to the purchaser. The jurisdiction of the High Court of Justice to order a sale of land (*p*) is either derived from the general equitable or

Jurisdiction of the Court to order a sale of land.

Court, see 2 Dart, V. & P. 1313 *sq.*; 1 Dan. Ch. Pr. 872 *sq.*, 7th ed.; 1 Seton on Decrees, 333 *sq.*, 338, 6th ed.; 1 Davidson, Prec. Conv. 499 *sq.*, 5th ed.

(*o*) Stat. 44 & 45 Vict. c. 41.

(*p*) The original jurisdiction of the Court of Chancery to order a sale of land appears to have been confined to cases where such a sale was necessary in order to satisfy creditors' claims enforceable against the land in that Court, or where a trust for sale of the land had been created and was exercisable: *Lechmere* v. *Brasier*, 2 J. & W. 287; *Calvert* v. *Godfrey*, 6 Beav. 97; *Carlyon* v. *Truscott*, L. R. 20 Eq. 348; *Re Staines*, 33 Ch. D. 172. Thus in suits for the administration of the estates of deceased persons the Court might order a sale of chattels real, and might, if there was jurisdiction to administer the real estate, either by reason of the same having been charged with the payment of debts or under stat. 3 & 4 Will. IV. c. 104, order a sale of real estate. The Court might also order a sale of land in a suit to enforce an equitable lien in the nature of an equitable mortgage of land, as in the case of a vendor's lien for unpaid purchase money: *Mackreth* v. *Symmons*, 15 Ves. 329; *Neate* v. *Marlborough*, 3 My. & Cr. 407, 417; *Governors of Greycoat Hospital* v. *Westminster Improvement Commrs.*, 1 De G. & J. 531; *Skene* v. *Cook*, 1902, 1 K. B. 682, 688, 689; Seton on Decrees, 2054, 6th ed. And lands forming part of the assets of a partnership firm might be ordered to be sold under the general jurisdiction of the Court to order the sale of the firm's property on a dissolution of partnership: *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Darby* v. *Darby*, 3 Drew. 495; *Taylor* v. *Neate*, 39 Ch. D. 538. The principal statutory jurisdiction of the High Court of Justice to order a sale of land is the following:—(1) That conferred by sect. 25

the statutory jurisdiction of the Court of Chancery transferred by the Judicature Acts to the High Court of Justice and for the most part exercisable in the Chancery Division (*q*), or else has been expressly conferred on the High Court since the Judicature Acts, so that such orders have been made in the past either by the Court of Chancery or by the High Court acting as a Court of Equity. When such an order is made, it binds the equitable interests in the land sold of all persons, who are either parties to or bound by the proceedings in which the order is made (*r*). There is therefore no need, when land is sold in pursuance of such an order, for any such persons to join in the conveyance to the purchaser; and where there are no other equitable interests existing in the property sold, all that is necessary is that the legal estate should be duly conveyed to him (*s*). But an order for the sale of any land does not affect either the legal or the equitable interests therein of any persons who are neither parties to nor

of the Conveyancing Act of 1881 (stat. 44 & 45 Vict. c. 41) to order a sale in redemption or foreclosure actions. This was new as to redemption actions, while as to foreclosure actions it replaced and extended the jurisdiction given by sect. 48 of the Chancery Procedure Act, 1852 (stat. 15 & 16 Vict. c. 86). (2) That conferred by the Partition Acts, 1868 and 1876 (stats. 31 & 32 Vict. c. 40; 39 & 40 Vict. c. 17). (3) That conferred by the Settled Estates Act, 1877, replacing a similar Act of 1856 (stats. 40 & 41 Vict. c. 18; 19 & 20 Vict. c. 120). (4) That conferred by the Confirmation of Sales Act, 1862 (stat. 25 & 26 Vict. c. 108). (5) That conferred by the Judgments Act, 1864, enabling the Court to order the sale of a judgment debtor's interest in land taken in execution by a judgment creditor. This superseded the former proceedings under the Judgments Act, 1838, to realise the charge given by that Act (see stats. 27 & 28 Vict. c. 112, s. 4; 1 & 2 Vict. c. 110, s. 13; Wms. Real Prop. 268, 19th ed.). (6) That conferred by R. S. C., Nov. 1893, r. 18 (Ord. LI. r. 1B), to order a sale in debenture holders' actions: and see R. S. C. 1883, Ord. LI. r. 1, which has been held not to extend the jurisdiction of the Court so as to enable it to make an order for sale of real estate, where none could have been made before: *Re Robinson*, 31 Ch. D. 247.

(*q*) Stats. 36 & 37 Vict. c. 66, ss. 16, 34; 37 & 38 Vict. c. 83; 38 & 39 Vict. c. 77; Wms. Real Prop. 164, 19th ed.

(*r*) *Cole* v. *Sewell*, 17 Sim. 40; *Re Williams*, 5 De G. & S. 515; *Basnett* v. *Moxon*, L. R. 20 Eq. 182, 184.

(*s*) 2 Hayes's Conveyancing, 104, n.; Davidson, Prec. Conv. vol. ii. pt. i. 270, n. (*a*), 283, n. (*b*), 4th ed.

bound by the proceedings in which the order was made; so that if any such interests should be outstanding, a good title is not made (*t*). As a rule, a purchaser of land under an order for sale made by the Court is entitled to require that the legal estate shall be duly conveyed to him (*u*): though the Court of Chancery, in the old days before power had been given by statute to dispose of estates vested in infants as trustees (*x*), would oblige a purchaser under a decree for sale of lands vested at law in an infant to accept the equitable title conferred by the order only, as the purchaser had notice from the record of the infancy, and therefore of the impossibility of conveyance before the infant attained full age (*y*). The occasion for this exception was removed by statutes of Will. IV. (*z*); and by the Trustee Acts, 1850 and 1852 (*a*), now replaced by the Trustee Act, 1893 (*b*), power was given to the Court, where a complete assurance of the whole legal estate in any lands sold under its order could not be obtained by reason of the disability of some person interested therein or for other causes, of effecting the conveyance of the legal estate by an order vesting the same in the purchaser. Since this jurisdiction was conferred, it has been the regular practice to resort thereto (*c*); and where lands have been sold under an order of the Court and any *legal* estate or interest

(*t*) See *Craddock* v. *Piper*, 14 Sim. 310, 312; *Govrs. of Greycoat Hospital* v. *Westminster Improvement Commrs.*, 1 De G. & J. 531; *Knight* v. *Pocock*, 24 Beav. 436; *Freeland* v. *Pearson*, L. R. 7 Eq. 246; *Jones* v. *Barnett*, 1899, 1 Ch. 611, 1900, 1 Ch. 370.

(*u*) *Noel* v. *Weston*, G. Coop. 138; *Morris* v. *Clarkson*, 3 Swanst. 558, 564; Sug. V. & P. 397, 398; *Freeland* v. *Pearson*, L. R. 7 Eq. 246.

(*x*) See stat. 11 Geo. IV. and 1 Will. IV. c. 47, s. 11; Sug. V. & P. 397, 398.

(*y*) *Waltham's case*, cited G. Coop. 139, Sug. V. & P. 397; *Morris* v. *Clarkson*, 3 Swanst. 558.

(*z*) Stats. 11 Geo. IV. and 1 Will. IV. c. 47, s. 11, and c. 60, s. 7.

(*a*) Stats. 13 & 14 Vict. c. 60, s. 29; 15 & 16 Vict. c. 55, s. 1.

(*b*) Stat. 56 & 57 Vict. c. 53, s. 30; see also sects. 26—29, 31—33, 50; and see as to the orders made and practice thereunder, 2 Seton on Decrees, 1261 *sq.*, 6th ed.

(*c*) 2 Dart, V. & P. 1347, and n. (*k*).

therein cannot be well assured by the person entitled thereto, whether by reason of his disability or of the same having been limited to some unborn or unascertained person or persons, the purchaser's title will not be complete unless an order vesting the same in him has been duly obtained (*d*). As regards the assurance to the purchaser of lands sold under an order of the Court of the equitable estate therein, we have seen (*e*) that the order for sale binds the equitable interests of all persons who are parties to or otherwise bound by the proceedings in which the order was made, and there is no need for any other assurance of such interests to be made. So that where any *equitable* estate has been limited to any unborn or unascertained person, there is no occasion to obtain an order expressly vesting the same in the purchaser; the order for sale is sufficient for this purpose. But in order to bind the equitable interests of persons intended to be bound by the proceedings, it was formerly necessary that the order for sale should be *duly* made, that is, made on a right exercise of some jurisdiction in that behalf (*f*) vested in the Court; and if this were not the case, the Court would not oblige the purchaser, if he took the objection, to accept the title, and if he did accept the title, it appears that he would not have been protected by the order (*g*). And the same result would follow, if the sale were not properly carried out according to the order, although the order itself were valid (*h*). Other irregularities in the proceedings, in which the order for sale was made, would not, as a rule, affect a purchaser under the order (*i*). But, as the order did

(*d*) See *Wake* v. *Wake*, 17 Jur. 545; *Wood* v. *Beetlestone*, 1 K. & J. 213; *Lees* v. *Coulton*, L. R. 20 Eq. 20; *Basnett* v. *Moxon*, ib. 182; Seton on Decrees, 1261, 1262, 6th ed.

(*e*) Above, p. 415.

(*f*) Above, p. 414, n. (*p*).

(*g*) *Lechmere* v. *Brasier*, 2 J. & W. 287; *Blacklow* v. *Laws*, 2 Hare, 40; *Calvert* v. *Godfrey*, 6 Beav. 97; 2 Dart, V. & P. 1351.

(*h*) *Colclough* v. *Sterum*, 3 Bligh, 181; *Powell* v. *Powell*, L. R. 10 Ch. 130.

(*i*) See *Lutwych* v. *Winford*, 2

not affect the interests, whether legal or equitable, of any persons who were neither parties to nor otherwise bound by the proceedings, it was always necessary for the purchaser to see that all persons interested in the property sold were so bound, or else that he would obtain an express conveyance from them of their respective interests (*k*). By the Conveyancing Act of 1881 (*l*) an order of the Court under any statutory or other jurisdiction shall not as against a purchaser be invalidated on the ground of want of jurisdiction, or want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not. The *dicta*, if not the decisions, upon the construction of this enactment have been somewhat conflicting (*m*); and it is not easy to state its precise effect. But it is to be observed that it purports to cure one defect of title only, the invalidity of an order of the Court, whether for sale or otherwise; and that it does not appear to extend the effect of a valid order so as to bind any persons whose interests would not otherwise have been affected thereby (*n*). The enactment appears to protect purchasers from disturbance by persons who might otherwise have ejected them or recovered against them on the ground that an order of the Court forming part

Order of the Court not to be invalidated for want of jurisdiction.

Bro. C. C. 248; *Lloyd* v. *Johnes*, 9 Ves. 37, 65; *Curtis* v. *Price*, 12 Ves. 89; *Bowen* v. *Evans*, 2 H. L. C. 257; *Beioley* v. *Carter*, L. R. 4 Ch. 230, 238; Sug. V. & P. 110; 2 Dart, V. & P. 1350—1352.

(*k*) *Colclough* v. *Sterum*, 3 Bligh, 181, 186; *Beioley* v. *Carter*, L. R. 4 Ch. 230, 238; Sug. V. & P. 111; 2 Dart, V. & P. 1352; and see above, pp. 415, 416, and note (*t*).

(*l*) Stat. 44 & 45 Vict. c. 41, s. 70, sub-s. 1, extending by sub-s. 3 to past as well as future orders, except those which had been already held to be invalid, or to invalidate which proceedings were pending; and declared by sub-s. 2 to have effect as to leases, sales or other acts authorised by the Court under the Settled Estates Act, 1877, or the Act of 1856, notwithstanding the exceptions therein mentioned: see stats. 19 & 20 Vict. c. 120, s. 28; 40 & 41 Vict. c. 18, s. 40.

(*m*) See *Re Hall Dare's Contract*, 21 Ch. D. 41; *Mostyn* v. *Mostyn*, 1893, 3 Ch. 376; *Jones* v. *Barnett*, 1899, 1 Ch. 611, 1900, 1 Ch. 370.

(*n*) It is submitted that any *dicta* to the contrary effect in *Mostyn* v. *Mostyn* (ubi sup.) are erroneous; see *Jones* v. *Barnett*, ubi sup.

of their title was invalid for want of jurisdiction or for any other cause therein mentioned. And it has been held that purchasers of land under an order for sale made by the Court are no longer at liberty to object to the title on the ground that the order is invalid for any of such causes (*o*). But the enactment does not protect a purchaser from disturbance by persons whose rights or interests were never intended to be affected by the order; it has not the effect of conferring on a purchaser under an order for sale a good title as against all the world (*p*). And where the order, being valid, is not properly carried out, the enactment does not appear to have any application. The duties of the conveyancer advising a purchaser of land, to which the title depends upon an order for sale made by the Court, remain, therefore, as above stated (*q*).

§ 10.—*Sale of an Equity of Redemption.*

Purchase of an equity of redemption.

The purchaser of an equity of redemption is exposed to the following risks:—First, since equitable charges or rights affecting equitable estates in land rank, as a rule, according to the order of the times at which they were created (*r*), he takes subject to all equities affecting the land purchased in the hands of the vendor at the time of sale, whether he have notice of any such equities or not. He buys, therefore, subject to all prior equitable mortgages of the land, whether made in favour of the legal mortgagee on further advances or of any other person (*s*), to any right of consolidation of securities

(*o*) *Re Hall Dare's Contract*, 21 Ch. D. 41.

(*p*) *Jones* v. *Barnett*, 1899, 1 Ch. 611, 1900, 1 Ch. 370.

(*q*) Pp. 413, 414.

(*r*) *Jones* v. *Jones*, 8 Sim. 633; *Wilmot* v. *Pike*, 5 Hare, 14; *Phillips* v. *Phillips*, 4 De G. F. & J. 208, 215; *Taylor* v. *London and County Bank*, 1901, 2 Ch. 231, 260.

(*s*) See previous note, and *Bailey* v. *Richardson*, 9 Hare, 734; *Taylor* v. *Russell*, 1892, A. C. 244, where the prior equitable mortgage was only excluded by tacking.

which the mortgagee may have already acquired (*t*), and to all other equities affecting the premises, such as any equitable right to set aside the conveyance to the vendor (*u*), or any claims on the premises arising from any trust to which the same may have been subject in the vendor's hands (*x*).* Secondly, in consequence of the doctrine of tacking equitable charges to the legal estate, the purchaser of an equity of redemption incurs the danger of being excluded by or postponed to equitable charges on the land made subsequently to the sale. Thus, if the legal mortgagee were to make further advances to the vendor after the sale, but whilst the vendor remained in possession or otherwise in apparent ownership of the land, and without having received notice of the sale, he would be entitled to tack all that might become due in respect of such advances to his original charge (*y*). And any other person who should make advances to the vendor on the security of the land after the sale and in the same circumstances, might, if he could obtain a transfer of the legal mortgage, tack what should be due under such subsequent advances to the original mortgage debt (*z*). The pur-

(*t*) See *White* v. *Hillacre*, 3 Y. & C. Ex. 597, 608, 609; *Jennings* v. *Jordan*, 6 App. Cas. 698; *Harter* v. *Colman*, 19 Ch. D. 630; *Minter* v. *Carr*, 1894, 3 Ch. 498. These cases establish that, if no right of consolidation should have been acquired prior to the sale of the equity of redemption, it cannot afterwards arise by reason of the mortgage and some security on other property of the mortgagor becoming subsequently vested in the same person, and absolute at law. But if a man buy from the same mortgagor, and at the same time, the equity of redemption of several properties subject to different mortgages, he takes them subject to any right of consolidation which may subsequently arise: *Vint* v. *Padget*, 2 De G. & J. 611; *Pledge* v. *White*, 1896, A. C. 187; and see Wms. Real Prop. 557—559, 19th ed.

(*u*) See *Bailey* v. *Barnes*, 1894, 1 Ch. 25, where the prior equitable right was only defeated by tacking.

(*x*) See *Bates* v. *Johnson*, Joh. 304, where the claim of the *cestui que trust* was only defeated by tacking: *Taylor* v. *London and County Bank*, 1901, 2 Ch. 231; Case reversed by 1903, A. C. 39.

(*y*) *Jones* v. *Powles*, 3 My. & K. 581; Sug. V. & P. 196; *Young* v. *Young*, L. R. 3 Eq. 801.

(*z*) *Frere* v. *Moore*, 8 Price, 475, 488, 489; *Jones* v. *Powles*, 3 My. & K. 581, 596, 598; *Bates* v. *Johnson*, Joh. 304; *Bailey* v. *Barnes*, 1894, 1 Ch. 25, 36, 37.

* see addenda vol 2.

chaser of an equity of redemption may guard against some of these risks, but against others he has no protection. Thus he may, and of course he always should inquire of the mortgagee, first, as to the state of the mortgage debt and what is owing thereon; secondly, whether the mortgagee has already made any further advances to the mortgagor on the security of the land purchased; and thirdly, whether the mortgagee has vested in himself any other mortgages or charges which affect any other property of the mortgagor and which he is entitled to consolidate with his mortgage on the purchased land. And the purchaser should give formal notice to the mortgagee of his contract for purchase. It is true that the mortgagee is not bound to answer such inquiries unless an offer to redeem his charge is made (*a*). And if the mortgagee should decline to answer these inquiries, the purchaser cannot safely proceed with the contract, and would, it is submitted, be entitled to repudiate the same on the ground that the vendor has failed to prove, by the only evidence that can possibly be accepted, facts material to the title. But if the mortgagee do answer such inquiries precisely, after being informed of the purpose with which they are made, he will be estopped from denying the truth of his answers, and so cannot afterwards assert his own charges or interests upon the property so as to defeat or postpone the purchaser's interest acquired on the faith of the representations so made (*b*). And notice to the mortgagee of the sale of the equity of redemption will of course prevent him from tacking any subsequent advances to his legal security (*c*).

But a person entitled to a charge on the purchase money to be paid under a contract for the sale of an equity of redemption, could not tack this charge to the legal mortgage: *Lacey* v. *Ingle*, 2 Ph. 413.

(*a*) *Bugden* v. *Bignold*, 2 Y. & C. C. C. 377, 390; *Low* v. *Bouverie*, 1891, 3 Ch. 82.

(*b*) *Ibbottson* v. *Rhodes*, 2 Vern. 554; *Stronge* v. *Hawkes*, 4 De G. M. & G. 186, 196; *Low* v. *Bouverie*, 1891, 3 Ch. 82.

(*c*) *Le Neve* v. *Le Neve*, Amb. 436, 446; *Birch* v. *Ellames*, 2

But the purchaser of an equity of redemption in land cannot protect himself against equitable rights, which are prior to his own and are either unknown to or suppressed by the vendor, by any notices or inquiries. Notice of his purchase to the mortgagee seised of the legal estate can give him no priority over equitable incumbrancers already existing (*d*), and will not prevent a subsequent equitable incumbrancer from excluding him by tacking, if the subsequent incumbrancer should procure a transfer of the legal mortgage (*e*). The purchaser of an equity of redemption should inquire of the vendor whether he has created or is aware of any equitable charge, incumbrance or right which affects the property sold and is not disclosed by the abstract; and it is submitted that, as the purchaser is to acquire no legal estate which would protect him against unknown equities, this question is relevant to the title offered by the vendor, and the vendor cannot vouch the rule in *Re Ford and Hill* (*f*) as an excuse for refusing to answer (*g*). The purchaser should also inquire of the legal mortgagee whether he has had notice or is aware of any such equitable charge, incumbrance or right. But if these inquiries fail to inform the purchaser of some existing equitable incumbrance, and he only discover the same after payment of his purchase money, he will have no remedy but to procure, if he can, a transfer of the legal mortgage, and so forestall the other incumbrancer in using the resource of tacking. If he can accomplish this, he will be entitled to hold the land free from the claims of all persons

Anst. 427; see also *Hopkinson* v. *Rolt*, 9 H. L. C. 514; *Menzies* v. *Lightfoot*, L. R. 11 Eq. 459; *London and County Bank* v. *Ratcliffe*, 6 App. Cas. 722; *West* v. *Williams*, 1899, 1 Ch. 132.

(*d*) Above, p. 419, nn. (*r*), (*s*); *Rooper* v. *Harrison*, 2 K. & J. 86; *Thipps* v. *Lovegrove*, L. R. 16 Eq. 80, 91; *Re Richards*, 45 Ch. D. 589; *Hopkins* v. *Hemsworth*, 1898, 2 Ch. 347.

(*e*) *Peacock* v. *Burt*, 4 L. J. (N. S.) Ch. 33.

(*f*) 10 Ch. D. 365.

(*g*) See above, pp. 107, n. (*z*), 143.

entitled thereto or interested therein under any equitable rights of which he had no notice at the time when he paid his purchase money; and any subsequent notice of any such right will be immaterial (*h*): but he cannot so avoid any equities of which he *had* notice, either actual or constructive (*i*), before he actually paid the price agreed upon for the land (*k*). If, therefore, he receive notice of any such equities after the contract for sale, but before completion, of course he cannot safely proceed with the purchase unless the equities are released or the persons entitled thereunder concur in the conveyance to him (*l*).

Purchaser of equity of redemption paying off the first mortgage.

It has been held that if the purchaser of an equity of redemption pay off the first mortgage when he has notice of an intermediate charge, the first mortgage is extinguished and the intermediate incumbrancer is entitled to enforce his security as the first charge on the land without redeeming the mortgage so paid off (*m*). This doctrine has been frequently mentioned with disapproval, though never precisely overruled (*n*). It has however been established that if, when the first mortgage is so got in, an intention be shown to keep the charge on foot, the purchaser will be entitled to the

(*h*) See the cases cited above, p. 420, and notes. But where the legal estate is held on an express trust for the prior incumbrancer, the purchaser cannot obtain any advantage by getting in the same after he has had notice of the prior incumbrance: *Saunders* v. *Dehew*, 2 Vern. 271; *Mumford* v. *Stohwasser*, L. R. 18 Eq. 556; *Harpham* v. *Shacklock*, 19 Ch. D. 207; *Taylor* v. *London and County Bank*, 1901, 2 Ch. 231, 256, 257.

(*i*) *Le Neve* v. *Le Neve*, Amb. 436, 446; *Birch* v. *Ellames*, 2 Anst. 427; *Potter* v. *Sanders*, 6 Hare, 1; *Bailey* v. *Richardson*, 9 Hare, 734.

(*k*) *Tourville* v. *Naish*, 3 P. W. 306; *Story* v. *Windsor*, 2 Atk. 630; *Hardingham* v. *Nicholls*, 3 Atk. 304; *Maundrell* v. *Maundrell*, 10 Ves. 246, 271; *Taylor* v. *Baker*, 5 Price, 306; *Rayne* v. *Baker*, 1 Giff. 241.

(*l*) Above, pp. 135, 250.

(*m*) *Toulmin* v. *Steere*, 3 Mer. 210.

(*n*) See *Watts* v. *Symes*, 1 De G. M. & G. 240, 244; *Adams* v. *Angell*, 5 Ch. D. 634, 641, 645, 647; *Thorne* v. *Cann*, 1895, A. C. 11, 16—18; *Liquidation Estates Purchase Co.* v. *Willoughby*, 1896, 1 Ch. 726, 1898, A. C. 321.

benefit thereof, and the intermediate incumbrancer cannot then enforce his security without redeeming the charge. And it is not necessary for this purpose that the mortgage should be transferred to a trustee for the purchaser; it will not merge if the intention to keep it alive appear either by express declaration or by inference from the surrounding circumstances, notwithstanding that the mortgage and the equity of redemption be both vested in the same person (*o*).

Purchase by mortgagee of the equity of redemption.

If the mortgagee under a legal mortgage of land purchase the equity of redemption, he will be entitled, under the doctrine of tacking, to hold the land free from all intermediate equitable incumbrances of which he had no notice at the time when he paid his purchase money (*p*). But with regard to mesne incumbrances of which he had notice and which were not discharged, it was formerly considered that, unless his mortgage were transferred to a trustee for himself for the purpose of keeping it alive, it merged in his ownership of the premises, with the consequence that the mesne incumbrances became first charges thereon, and the incumbrancers could enforce their securities without redeeming the legal mortgage (*q*). But it is now established in

(*o*) See cases cited in preceding note; and *Bailey* v. *Richardson*, 9 Hare, 734; *Phillips* v. *Gutteridge*, 4 De G. & J. 531; *Hayden* v. *Kirkpatrick*, 34 Beav. 645; *Re Pride*, 1891, 2 Ch. 135. Of course, a mortgagor paying off a first mortgage created by himself cannot by any means set up the charge to defeat or hinder his own subsequent incumbrancers: *Watts* v. *Symes*, 1 De G. M. & G. 240, 244. Neither can he defeat his own subsequent incumbrancers by purchasing the property at a sale thereof under a power of sale given by such first mortgage: *Otter* v. *Vaux*, 2 K. & J. 650, 6 De G. M. & G. 638. But if a man become entitled to an equity of redemption by descent or devise, he may keep alive for his own benefit any charge made by his predecessor which he chooses to pay off: *Davis* v. *Barrett*, 14 Beav. 542; or if he be himself the mortgagee under any such previous charge, the same will not merge if such be not his intention: *Forbes* v. *Moffatt*, 18 Ves. 384.

(*p*) Above, pp. 420, 423, and notes.

(*q*) 2 Dart, V. & P. 917, 5th ed., 1040, 6th ed.; *Toulmin* v. *Steere*, 3 Mer. 210, 224.

this case, as well as that of the redemption of a first mortgage by the purchaser of an equity of redemption, that if an intention to keep the mortgage on foot be shown, either by express declaration or by implication from the surrounding circumstances, the mortgagee purchasing the equity of redemption may avail himself of the charge as a protection against mesne incumbrancers, of whose claims he had notice, notwithstanding that the first mortgage, as well as the equity of redemption, be vested in himself alone; and when such an intention is shown the mesne incumbrancers must redeem the first mortgage if they wish to enforce their securities (*r*). Both a mortgagee purchasing the equity of redemption, and the purchaser of an equity of redemption redeeming the mortgage, should be careful to take a conveyance in such form that there can be no doubt whether it is intended to keep the charge alive or not (*s*).

§ 11.—*Sale of Licensed Property.*

Sale of licensed property.

On the sale of a public-house or other licensed property as a going concern, the vendor is bound, on the day fixed for completion, to produce a valid and effectual licence of the kind promised by the contract, and to indorse or to procure the holder thereof to indorse the same to the purchaser, so that the purchaser may be enabled to apply at once for interim authority to carry on the business until the next special sessions, and to apply at such sessions for a transfer of the licence (*t*). And on the sale of such property, time is of the essence of the contract; so that if the vendor cannot perform his obligation in this respect on the very day fixed for com-

(*r*) *Adams* v. *Angell*, 5 Ch. D. 634; above, p. 424, n. (*o*).

(*s*) See *Adams* v. *Angell*, ubi sup.; Davidson, Prec. Conv. vol. ii. pt. i. 324, n., 327, n., 4th ed.; 1 Key & Elph. Prec. Conv. 490, 531 and notes, 4th ed., 465, 504 and notes, 7th ed.

(*t*) *Tadcaster Tower Brewery Co.* v. *Wilson*, 1897, 1 Ch. 705.

pletion, the purchaser is entitled to repudiate the contract (*u*). But in the absence of special stipulation to the contrary, the vendor is not bound to do more than this, or to procure for the purchaser a transfer of the licence or even interim authority to carry on the business, and does not warrant that such transfer or interim authority shall be procured; and the purchaser buys subject to the risks that the licence will not be renewed at the next annual Brewster sessions (*x*), that the transfer of the licence to him will be refused at the special sessions, and that interim authority will not be accorded to him (*y*).

§ 12.—*Land subject to Restrictive Covenants.*

Land subject to restrictive covenants.

As we have seen (*z*), the fact that any land purchased is subject to restrictive covenants is such a defect of title as justifies the purchaser in refusing to perform the contract; unless the vendor should have expressly stipulated that the purchaser shall make no objection to the title on that account. A vendor of land subject to such covenants must, of course, be careful to make a special condition of sale to this effect. It is now settled, with regard to covenants relating to land and entered into by a tenant in fee with a former owner, from whom he purchased, or with an adjoining landowner, that in so far as such covenants bind the covenantor to some forbearance restrictive of the free use of his land, and were made with the object of benefiting the owners and occupiers of some other land retained by the former owner or belonging to the adjoining landowner, as the

(*u*) *Seaton* v. *Mapp*, 2 Coll. 556; *Day* v. *Luhke*, L. R. 5 Eq. 336; *Claydon* v. *Green*, L. R. 3 C. P. 511; *Cowles* v. *Gale*, L. R. 7 Ch. 12; *Powell* v. *Marshall*, 1899, 1 Q. B. 710, 712.

(*x*) See *Sharp* v. *Wakefield*, 1891, A. C. 173.

(*y*) *Tadcaster Tower Brewery Co.* v. *Wilson*, 1897, 1 Ch. 705.

(*z*) Above, pp. 133, 156—158.

case may be (*a*), the burthen thereof runs with the land in equity, though not at law; that is to say, the restrictions are enforceable in equity by action for an injunction against all persons who acquire the land from the covenantor, either by act of law or assignment (*b*), except only (as in the case of other equities) such assigns as have acquired the legal estate in the land as purchasers for value in good faith, without notice of the covenant (*c*). But the burthen of covenants by a tenant in fee to do some positive act upon or relating to his land, as to repair a road or build a house or a wall, does not run with the land either at law or in equity. And where a landowner enters into restrictive covenants with some person, but not with the object of benefiting the owners and occupiers of some other land belonging to the covenantee, as where a vendor sells all his land in some particular place, retaining no adjoining or neighbouring land, and the purchaser enters into covenants restrictive of the use thereof with the vendor, the burthen of the covenants does not run in equity with the covenantor's land, and the covenantee cannot enforce them by action for an injunction against the covenantor's assigns, whether they had notice of the covenants or not; for the burthen imposed in equity by restrictive covenants is analogous to the burthen of an easement, which cannot exist in the absence of a dominant tenement (*d*). In such cases the covenantors and their representatives in law are liable

(*a*) See *Formby* v. *Barker*, 1903, W. N. 133; 72 L. J. Ch. 716, and 51 W. R. 646.

(*b*) *Tulk* v. *Moxhay*, 2 Ph. 774; *Renals* v. *Cowlishaw*, 9 Ch. D. 125, 11 Ch. D. 866; *Austerberry* v. *Oldham*, 29 Ch. D. 750; *Spicer* v. *Martin*, 14 App. Cas. 12; *Mackenzie* v. *Childers*, 43 Ch. D. 265; *Rogers* v. *Hosegood*, 1900, 2 Ch. 388.

(*c*) *Carter* v. *Williams*, L. R. 9 Eq. 678; *London & South Western Rail. Co.* v. *Gomm*, 20 Ch. D. 562, 583; *Nottingham, &c. Co.* v. *Butler*, 16 Q. B. D. 778, 787, 788; *Rowell* v. *Satchell*, 1903, 2 Ch. 212, 221. Notice may, of course, be either actual or constructive: *Wilson* v. *Hart*, L. R. 1 Ch. 463; *Patman* v. *Harland*, 17 Ch. D. 353; above, pp. 257 *sq.*

(*d*) *Formby* v. *Barker*, ubi sup.

personally upon such covenants; but their assigns of the land, as such, do not come under any liability in respect thereof (*e*). It is therefore no objection to the title to land that the owner or his predecessor seised thereof in fee has entered into some covenant relating thereto, either of a positive and not of a restrictive nature, or of a restrictive nature but not made with the object of benefiting some other land. With respect to stipulations restrictive of the use of land, they may be attached to land as a burthen thereon in equity, not only by express covenant, but also by an express or implied contract entered into, without deed, by the tenant in fee simple of the land (*f*). Thus, where lands are laid out and sold in plots as a building estate, and by the conditions of sale the purchasers are required for their mutual benefit to observe stipulations restrictive of the use of the plots purchased, the burthen of these stipulations will be attached in equity to the purchased lands, although the purchasers should not enter into any deed of covenant to observe the same. And if in such case it appear from the conditions or the circumstances attending the sale that the intention is that the purchasers shall have the benefit of the restrictive stipulations as regards all the lands offered for sale, the burthen of these stipulations will attach to any of the lands which may remain unsold, and will be enforceable accordingly against the vendor, his representatives in law and assigns taking with notice thereof (*g*). And not only may lands be subjected to

(*e*) *Haywood* v. *Brunswick, &c. Society*, 8 Q. B. D. 403; *Austerberry* v. *Oldham*, 29 Ch. D. 750; *Holford* v. *Acton, &c.*, 1898, 2 Ch. 240, *Formby* v. *Barker*, ubi sup.

(*f*) *Tulk* v. *Moxhay*, 2 Ph. 774, 778; *Carter* v. *Williams*, L. R. 9 Eq. 678.

(*g*) See *Renals* v. *Cowlishaw*, 9 Ch. D. 125, 11 Ch. D. 866; *Spicer* v. *Martin*, 14 App. Cas. 12; *Mackenzie* v. *Childers*, 43 Ch. D. 265; *Re Birmingham, &c. Co. and Allday*, 1893, 1 Ch. 342; *Holford* v. *Acton, &c.*, 1898, 2 Ch. 240, 246; *Rowell* v. *Satchell*, 1903, 2 Ch. 212; cf. *Tucker* v. *Vowles*, 1893, 1 Ch. 195.

the burthen of restrictive stipulations by contract implied on the part of the tenant in fee from the terms on which he has offered the same, together with adjoining lands, for sale and has sold the adjoining lands to purchasers, but if a block of lands or houses be offered to be let on lease on the terms that all the tenants shall enter into the same restrictive covenants, so that each tenant is offered the advantage to be gained from the other tenants' covenants, any of the lands or houses remaining unlet will be subject, in the hands of the lessor, his representatives in law and assigns with notice, to the burthen of the restrictive stipulations (*h*). And in such cases it appears that the agreement giving rise to an equitable right to enforce the restrictions may be established by parol evidence, notwithstanding the Statute of Frauds (*i*), under the doctrine of part performance (*k*). It follows that anyone who is about to sell or let lands in lots, subject to restrictive covenants to be entered into by the various purchasers or lessees, should be careful, unless he is willing that the unsold or unlet land shall be affected with the same burthen, to stipulate expressly that, as regards any of the lots which shall not be sold or let, he shall not stand in the place of a purchaser or lessee thereof so as to be bound by the covenants (*l*). If land subject to any stipulation

(*h*) *Spicer* v. *Martin*, 14 App. Cas. 12.

(*i*) Stat. 29 Car. II. c. 3, s. 4; above, p. 3.

(*k*) Above, p. 11; *Piggott* v. *Stratton*, 1 De G. F. & J. 33, 49; and see Lord Macnaghten's judgment in *Spicer* v. *Martin*, 14 App. Cas. 12, 20—25, where he considered that though the appellant might not have incurred any contractual liability on the construction of the correspondence between the parties and had not made any false representation which he was estopped from disputing, as to an existing fact, he had nevertheless "invited the public to come in and take a portion of an estate which was bound by one general law." This invitation or offer, however, could only be established by admitting evidence, outside the written memorandum of the contract for letting, of the circumstances under which the appellant had bought and subsequently let the lands in question.

(*l*) See 1 Davidson, Prec. Conv. 712, 4th ed.; 576, 5th ed.; Davidson's Concise Precedents, 119, 17th ed.; *Osborne* v. *Bradley*, 1903, 2 Ch. 446.

restrictive of the user thereof come to the hands of anyone who takes the legal estate as purchaser for value in good faith without notice of the restriction, he is, as we have seen (*m*), entitled to hold the land free from the restriction, and any purchaser from him will enjoy the same immunity, even though such purchaser bought with notice of the restriction. But if a man's title to hold land free from some such restriction depend on proof of the fact that he so purchased the same without notice as above mentioned, he will not be able to oblige a purchaser from him under an open contract to specific performance of the agreement for sale (*n*); for the Court considers that a title depending on proof of such a fact is too doubtful to force upon an unwilling purchaser (*o*). In such a case, therefore, the vendor must be careful to protect himself by a special condition of sale.

Devolution of the benefit of restrictive covenants.

With respect to the devolution of the benefit of a covenant or contract restrictive of the use of the land and entered into by a tenant in fee with a vendor or an adjoining landowner, the question to be considered is whether the parties to the contract intended that the benefit thereof should enure to the person originally entitled to enforce the obligation in his capacity of owner of some neighbouring land and should be annexed to the ownership of that land (*p*). If this be the case the benefit of the contract will pass, without express mention, by a conveyance of that land, in the some manner as an easement appurtenant thereto will pass therewith at law (*q*); and any assign, whether in fee or for any less estate (*r*), of the neighbouring land will be entitled in equity to enforce the restrictions (*s*). And

(*m*) Above, p. 427.

(*n*) *Nottingham, &c. Co.* v. *Butler*, 16 Q. B. D. 778.

(*o*) *Freer* v. *Hesse*, 4 De G. M. & G. 495; *Re Handman and Wilcox's Contract*, 1902, 1 Ch. 599.

(*p*) See the cases cited above, p. 427, nn. (*a*), (*b*).

(*q*) *Child* v. *Douglas*, Kay, 560, 568; *Rogers* v. *Hosegood*, 1900, 2 Ch. 388.

(*r*) *Taite* v. *Gosling*, 11 Ch. D. 273.

(*s*) *Whatman* v. *Gibson*, 9 Sim.

for this purpose it is not necessary that the assign should be *in* of the same estate as the original contractor had (*t*). If the restrictions be created by covenant, it appears that the benefit of the covenant will run at law with the land, for the advantage of which the restrictions were imposed; but that an assignee of the land could not sue on the covenant at law unless he took the original covenantor's estate therein (*u*). When the benefit of such a covenant or contract has passed to an assign of the land, for the advantage of which the restriction was created, the burthen of the contract cannot, of course, be effectually released by any act or any deed of the person originally entitled to enforce the agreement (*x*). If a landowner entitled to the benefit of a contract restricting the use of adjoining land make or permit such use of his own land that it would be unreasonable for him to insist any longer on the observance of the restrictions with respect to the adjoining land, he will lose his equitable right to enforce such restrictions specifically by action for an injunction (*y*). Such a landowner may also lose this equitable right by acquiescence in breach of the restrictions or delay in asserting the right (*z*). These facts will not, however, deprive him of any right he may have to enforce the contract at law, although they may be taken into con-

196; *Mann* v. *Stephens*, 15 Sim. 377; *Coles* v. *Sims*, 5 De G. M. & G. 1; and cases cited in the two preceding notes.

(*t*) See note (*q*), above.

(*u*) *Rogers* v. *Hosegood*, 1900, 2 Ch. 388, 404.

(*x*) *S. C.*

(*y*) *Bedford* v. *Trustees of British Museum*, 2 My. & K. 552. See *Osborne* v. *Bradley*, 1903, 2 Ch. 446, but note that the ground on which that decision is founded (viz., that the restriction was created for the benefit of the vendor, but not as the owner of any particular property) appears to be taken away by the decision in *Formby* v. *Barker*, above, p. 427.

(*z*) *Roper* v. *Williams*, T. & R. 18; *Peek* v. *Matthews*, L. R. 3 Eq. 515; *Gaskin* v. *Balls*, 13 Ch. D. 324; *Sayers* v. *Collyer*, 28 Ch. D. 103; see *German* v. *Chapman*, 7 Ch. D. 271; *Knight* v. *Simmonds*, 1896, 2 Ch. 294; *Rowell* v. *Satchell*, 1903, 2 Ch. 212; *Osborne* v. *Bradley*, 1903, 2 Ch. 446.

sideration in assessing the amount of damages recoverable (*a*). But after long acquiescence by the covenantee in a breach of the covenant, a waiver of the covenant will be presumed (*b*). If land be sold together with the benefit of any covenant or contract restricting the use of any adjoining land, the vendor must, of course, prove his title to this advantage, as in the case of his selling any easement or other legal right exercisable over any land of which he is not the owner. And if a man sell land together with the advantage of some restriction to be newly created as to the use of other land of his own, he must show a good title to the latter piece of land as well as the former (*c*).

§ 13.—*Investigation of Title in View of a Mortgage.*

Investigation of title in view of mortgage.

A few words may be added on the investigation of title in view of taking a mortgage of land. When it is proposed to obtain a loan of money on the security of a mortgage of land, the title is usually investigated even more strictly than on a sale (*d*): but the parties stand in a very different position from that of a vendor and purchaser. In the first place, it is not usual for persons proposing to lend money on a mortgage of lands to bind themselves by contract to make the loan (*e*). They are, therefore, generally in a position to exact any evidence of title which they may choose to demand, as they can at any time decline to proceed with the transaction, if the title produced is in any respect insufficient. They should, however, before commencing the investigation of the title to the lands proposed to be mortgaged or incurring any other trouble or expense in the matter, be careful to stipulate expressly that the mortgagor shall

(*a*) See *Bedford* v. *Trustees of British Museum*, 2 My. & K. 552; *Sayers* v. *Collyer*, 28 Ch. D. 103.

(*b*) *Hepworth* v. *Pickles*, 1900, 1 Ch. 108.

(*c*) Above, p. 383, and n. (*m*).

(*d*) Wms. Real Prop. 449, 13th ed.; 577, 19th ed.

(*e*) Davidson, Prec. Conv. vol. ii. pt. i. p. 104, n. (*a*), 4th ed.

pay all their costs and expenses of and incident to the transaction proposed in any event, whether they choose to make the loan or not. For although the regular course of practice, where a mortgage is completed, is for all costs incurred by the mortgagee in investigating the title, valuing the land, and otherwise preparing for the loan, to be paid by the mortgagor (*f*), yet where the parties are not bound to each other by any contract, there is no obligation on the mortgagor to discharge such costs, if the loan be not made (*g*). Unless, therefore, an intending mortgagee make the above-mentioned express stipulation, he runs the risk of being out of pocket by the transaction, if he should be obliged to decline the loan on account of some defect in the title. If an agreement should be made that one shall lend and another borrow money on mortgage of some particular land, it is not an implied term of the contract that the borrower shall prove his title to the land for the last sixty or forty years, or any other particular period; as the transaction of borrowing implies that securities of every degree of safety may be made available, any risk run with regard to the title being compensated by the terms agreed upon as to the rate of interest to be paid or otherwise (*h*). It is not, therefore, a breach of such a contract for the borrower to fail to show a good marketable title to the land: although the contract would appear to be broken if the borrower should fail to produce any property of his corresponding with that described in the contract.

(*f*) If the loan be made without such costs being paid, they cannot be added as mortgagee's costs to the security: but they are recoverable by the mortgagee from the mortgagor personally under an implied contract of indemnity: *Wales* v. *Carr*, 1902, 1 Ch. 860.

(*g*) *Rigley* v. *Daykin*, 2 Y. & J. 83; *Wilkinson* v. *Grant*, 18 C. B. 319; *Melbourne* v. *Cottrell*, 5 W.R. 884, 29 L. T. O. S. 293. But where the Court sanctioned a mortgage of an infant's estate, and the matter went off without the proposed mortgagee's default, he was allowed his costs of investigating the title out of the infant's estate: *Craggs* v. *Gray*, 35 Beav. 166.

(*h*) *Melbourne* v. *Cottrell*, ubi sup.; and see *National Provincial Bank of England* v. *Games*, 31 Ch. D. 582.

The Court will not, however, specifically enforce a contract to lend money on mortgage of some particular property at suit of either the borrower or the lender (*i*); unless the money should have been first actually advanced by the lender on the borrower's promise to give the particular security (*k*): but the person aggrieved by a breach of such a contract may recover damages proportionate to the loss he has sustained (*l*). It follows that, if an intending mortgagee of land should contemplate entering into a contract to make the loan, he should expressly stipulate that the borrower shall first show a good marketable title to the land to the satisfaction of the lender's counsel, that the lender shall be at liberty to rescind the contract if his counsel shall not accept the title, and that the borrower shall pay all the lender's costs (*m*) and expenses of and incident to the transaction in any event, whether the loan be made or not. If it be intended that the lender shall recover any compensation beyond expenses out of pocket in the event of the loan not being made, such as interest for his money whilst lying idle, this must be the subject of express stipulation (*n*).

What title should be required on behalf of a mortgagee.

In advising on title on behalf of an intending mortgagee, it must be remembered that the object of the transaction proposed is very different from that of a

(*i*) *Rogers* v. *Challis*, 27 Beav. 175; *Sichel* v. *Mosenthal*, 30 Beav. 371; *South African Territories, Ltd.* v. *Wallington*, 1897, 1 Q. B. 692, 1898, A. C. 309.

(*k*) *Ashton* v. *Corrigan*, L. R. 13 Eq. 76; *Hermann* v. *Hodges*, L. R. 16 Eq. 18; *Taylor* v. *Eckersley*, 2 Ch. D. 302.

(*l*) See *Western Wagon, &c. Co.* v. *West*, 1892, 1 Ch. 271, 277; *South African Territories, Ltd.* v. *Wallington*, ubi sup. Where the borrower under such a contract breaks off the transaction without reason, the lender can recover his solicitor's costs as damages: *Carter* v. *Merrion*, 32 L. T. N. S. 663.

(*m*) Where an intending borrower agreed to pay the lender's reasonable costs in case the loan went off, it was held that this did not include the commission charged by the lender's bankers for withdrawing his money from deposit: *Re Blakesley*, 32 Beav. 379.

(*n*) *Sweetland* v. *Smith*, 3 Tyrw. 491.

sale. Purchasers generally buy land with the view of occupying or enjoying it; they seldom buy it for immediate re-sale. But the object of a mortgagee is simply to obtain good security for the repayment of his money, whenever he may desire to call it in. And, assuming that the valuation of the land is satisfactory, what conduces most to this end is that he should be able at any time to exercise effectually his best and most convenient remedy, which is his power of sale. While purchasers, therefore, so long as they can obtain a good holding title, are often willing to waive defects of title which will be cured by lapse of time or may be covered by special conditions on a re-sale, a mortgagee will always desire to get a good marketable title; for he contemplates the possibility of having recourse to a forced sale, when special conditions, in spite of the avidity with which they are usually swallowed at the auction mart, may be depreciatory. The conveyancer advising an intending mortgagee should therefore see that his client will obtain a good marketable title, that is, a title under which the property can be put up for sale without any special conditions restricting the purchaser's rights, or which an unwilling purchaser under an open contract would be obliged to accept (*o*). As we have seen (*p*), an intending mortgagee is not usually bound, as a purchaser very commonly is, by any contract requiring him to accept less than a good marketable title. If it should be proposed that an intending mortgagee should accept a title less than this, the question, whether he may reasonably concede what is asked, should be determined by considering whether the suggested concession will practically hamper the exercise of his power of sale. And as a mortgagee on completion gets only a parchment security, and does not,

Good marketable title.

(*o*) *Pyrke* v. *Waddingham*, 10 Hare, 1, 8.
(*p*) Above, p. 432.

like a vendor, enter into possession of the land, there is the more reason for seeing that the evidence of the mortgagor's title is in every respect complete. The title deeds especially should be examined with most particular care (*q*); for frauds and forgeries have been far more frequently effected in connection with the mortgage of land, where there is no transfer of the actual possession, than upon sale. As regards the evidence both of any facts material to the title and the identity of the premises, a mortgagee will, as a rule, require strict proof according to conveyancing practice (*r*). And we have seen (*s*), purchasers, who have to pay out of their own pockets the expense of procuring evidence not in the vendor's possession, often content themselves with informal evidence, or sometimes they waive proof of such matters, especially where the vendor and his predecessors have long been known as the owners of the land. But an intending mortgagee cannot safely dispense with good evidence in these respects. With these differences, the investigation of title in view of a mortgage of land is carried out in like manner as upon a sale.

Transfer of mortgage.

Investigation of title prior to taking a transfer of a mortgage is, of course, governed by the same considerations as arise on a proposal for a new mortgage. On the transfer of a mortgage, made without the privity of the mortgagor, the transferee takes subject to the state of account then existing between the mortgagor and the mortgagee (*t*). And if the transferee omit to give to the mortgagor notice of the transfer, he will not be entitled to hold his legal estate in the mortgaged property as security for any sums of money paid since the transfer by the mortgagor to the original

(*q*) See above, pp. 114, 115.
(*r*) Above, pp. 104 *sq.*, 114.
(*s*) Above, p. 113.
(*t*) *Matthews* v. *Wallwyn*, 4 Ves. 118.

mortgagee on account either of interest or principal (*u*). A transfer of a mortgage cannot therefore be safely taken from the mortgagee alone without first inquiring of the mortgagor as to the state of the mortgage debt and the interest thereon and obtaining a favourable reply, and giving notice of the transfer to the mortgagor. In practice the mortgagor is always made a party to a transfer of the mortgage whenever his concurrence can be procured (*x*).

(*u*) *Williams* v. *Sorrell*, 4 Ves. 389; *Re Lord Southampton's Estate*, 16 Ch. D. 178, 185, 187; *Turner* v. *Smith*, 1901, 1 Ch. 213; see *Dixon* v. *Winch*, 1900, 1 Ch. 736.

(*x*) See Davidson, Prec. Conv., vol. ii. part ii. p. 264, 4th ed.

CHAPTER XI.

OF THE EFFECT OF THE CONTRACT PENDING COMPLETION.

§ 1. Of the Rights and Liabilities of the Parties pending Completion in respect of the Property sold.

§ 2. Of the Transfer pending Completion of the Rights and Liabilities under the Contract.

---

§ 1.—*Of the Rights and Liabilities of the Parties pending Completion in respect of the Property sold.*

THE effect of the contract upon the position of the parties has already been shortly stated (*a*). Unlike the case of goods, the legal estate in land can never pass by the contract itself; a conveyance distinct from the contract is always required (*b*). But there is a considerable likeness between the effect of the unconditional sale of a particular chattel at law and the effect in equity of the sale of lands. For in equity, subject to the vendor's duty of showing a good title, to his lien for the price, and to his right to the rents and profits up to the proper time for completion, the whole estate contracted for in the lands sold is considered as belonging to the purchaser as from the date of the contract for sale (*c*). As from that date, therefore, the vendor is

(*a*) Above, pp. 40, 41.
(*b*) Wms. Pers. Prop. 65, 71, 15th ed.
(*c*) Above, pp. 40, 41 and n. (*j*).

bound to use the same care in preserving or managing the property sold as a trustee must use with regard to the property subject to his trust (*d*). As from that date the property stands at the purchaser's risk as regards all losses caused without the vendor's fault, as through tempest, flood, fire, or fall in prices (*e*); and the purchaser takes the benefit of all improvements casually happening thereto, such as the death of the tenant for life on the purchase of the reversion (*f*). And as from that date in equity the lands sold are the purchaser's lands, and, if freehold or copyhold, are the purchaser's real estate (*g*), and are in the vendor's hands converted into personalty (*h*). But this passing of the equitable estate in the lands sold to the purchaser is subject to the condition that the contract be such as can be specifically enforced in equity; and if this condition fail, as by the want of a good title on the vendor's part, the lands remain the vendor's property in equity as well as at law (*i*). It is, of course, by reason of the doctrine that, as regards the consequences of any act contemplated by a binding agreement, equity regards what ought to be done as actually accomplished (*k*), that in the interval between contract and conveyance the property belongs in equity to the purchaser, for whom the vendor is constructively a trustee. This trusteeship

(*d*) Above, p. 41 and n. (*l*).

(*e*) *Poole* v. *Shergold*, 1 Cox, 273; *Paine* v. *Meller*, 6 Ves. 349, 352; *Harford* v. *Purrier*, 1 Madd. 532, 539; *Robertson* v. *Skelton*, 12 Beav. 260; Sug. V. & P. 291; *Rayner* v. *Preston*, 18 Ch. D. 1; *Castellain* v. *Preston*, 11 Q. B. D. 380.

(*f*) *White* v. *Nutts*, 1 P. W. 61, 62; *Ex parte Manning*, 2 P. W. 410; Sug. V. & P. 291, 292; Dart, V. & P. 286, n. (*u*), 732.

(*g*) Thus, the lands sold will pass under a devise of all the purchaser's lands or real estate: *Greenhill* v. *Greenhill*, Prec. Ch. 320; *Atcherley* v. *Vernon*, 10 Mod. 518, 526—529; *Potter* v. *Potter*, 1 Ves. sen. 437; *Marston* v. *Roe* d. *Fox*, 8 A. & E. 14, 63; Sug. V. & P. 175, 183 *sq.*; *Re Kensington*, 1902, 1 Ch. 203.

(*h*) *A.-G.* v. *Brunning*, 8 H. L. C. 243, 255, 265.

(*i*) *Broome* v. *Monck*, 10 Ves. 597; Sug. V. & P. 191, 193; *Lysaght* v. *Edwards*, 2 Ch. D. 499, 506—508; *Re Thomas*, 34 Ch. D. 166.

(*k*) Wms. Real Prop. 183, 19th ed.

is not absolute, for the vendor has a personal and substantial interest in the property, which he is entitled to protect (*l*). As a trustee for the purchaser, the vendor is bound, as we have seen, to take proper care of the property. His beneficial interest in the land sold consists, first, in his lien thereon for the price, involving the right to hold possession of the land until the whole purchase money be paid (*m*); and secondly, in the right to take for his own use the rents and profits up to the proper time for completion, that is, the time fixed by the contract for completion or, under an open contract, the time when a good title shall have been shown (*n*). And the vendor lies under the obligation, correlative to the latter benefit, of discharging all outgoings due in respect of the property sold up to the same time (*o*). We will first consider the rights of the purchaser, and the vendor's consequent liability to him, and will then examine the vendor's rights.

As we have seen (*p*), from the date of the contract the purchaser is in equity the owner of the property sold, though not absolutely, but subject to the condition that the contract be specifically enforceable. The lands sold are in equity his lands; he can sell, charge or devise them; if of inheritance, they are his real estate descendible to his heir, and are applicable as such for payment of his debts (*q*). He therefore bears all losses and takes the advantage of all additions or improvements which casually happen or are made to the

(*l*) *Shaw* v. *Foster*, L. R. 5 H. L. 321, 338; *Lysaght* v. *Edwards*, 2 Ch. D. 499, 506; *Rayner* v. *Preston*, 18 Ch. D. 1, 6.

(*m*) *Aeland* v. *Gaisford*, 2 Madd. 28, 32; *Phillips* v. *Silvester*, L. R. 8 Ch. 173, 176—178. It should be noted that the vendor's equitable lien on the land sold for unpaid purchase money continues after he has let the purchaser into possession or executed a conveyance to him, without receiving payment of the whole or part of the price.

(*n*) Above, pp. 22, 37, 41.

(*o*) Above, p. 41.

(*p*) Above, p. 439, and notes (*e*), (*f*), (*g*).

(*q*) *Paine* v. *Meller*, 6 Ves. 349, 352; *Seton* v. *Slade*, 7 Ves. 265, 274; *Broome* v. *Monck*, 10 Ves. 597, 614, 620, 621.

property after that date. Thus, if after the signing of the contract, but before its completion, a house or any other building erected on the land sold be accidentally destroyed by fire, the purchaser remains none the less liable to perform the contract without any abatement of the price, and this liability may be enforced, not only at law but by a decree for specific performance in equity (*r*). The same rule is applicable if the lands sold be devastated by tempest, earthquake, or volcanic eruption, or be flooded, or suffer an irruption of the sea (*s*), or lose in value by reason of a fall in prices (*t*). On the other hand, the purchaser takes the advantage of all improvements effected in the property sold through extraneous causes, such as any exertion of natural forces, the dropping of lives on sale of a reversion or remainder (*u*), the death of the incumbent on the purchase of an advowson (*v*), a general rise in the price of land, or the making of any road, railway, or other public work or undertaking, through or near the property (*x*). And it appears that if the vendor himself make permanent improvements, as by building after the contract, the purchaser will be entitled to the benefit thereof without further payment (*y*). The purchaser is also entitled in equity to all things which belong to the owner of the inheritance as against a tenant for life im-

(*r*) *Paine* v. *Meller*, 6 Ves. 349, 352; *Rayner* v. *Preston*, 18 Ch. D. 1. This is undoubtedly so in the case of an absolute sale; but if persons contract on such terms that the continued existence of the object of the contract is a condition precedent to the performance of the agreement, they are discharged from their respective obligations by the destruction of the object without their fault: *Taylor* v. *Caldwell*, 3 B. & S. 826; and see *Counter* v. *Macpherson*, 5 Moore, P. C., 83, 104, 105.

(*s*) Sug. V. & P. 291, 293, 294; Jessel, M. R., *Lysaght* v. *Edwards*, 2 Ch. D. 499, 507. The case is parallel to that of the absolute destruction before delivery and payment of the price of a particular chattel so sold as to pass the property to the purchaser: see *Taylor* v. *Caldwell*, 3 B. & S. 826, 833, 837.

(*t*) *Poole* v. *Shergold*, 1 Cox, 273.

(*u*) Above, p. 439.

(*v*) Above, p. 392.

(*x*) *Paine* v. *Meller*, 6 Ves. 349, 352.

(*y*) *Clare Hall* v. *Harding*, 6 Hare, 273, 296; *Monro* v. *Taylor*, 8 Hare, 51, 60; Sug. V. & P. 304; 1 Dart, V. & P. 286, n. (*u*), 291.

peachable for waste, such as timber trees blown or cut down (*z*), or minerals gotten after the contract either by a trespasser or by the vendor otherwise than in working, up to the proper time for completion, mines or quarries open at the time of sale (*a*).

Destruction by fire pending completion of a house insured by the vendor.

In connection with the destruction by fire of a house sold pending the completion of the contract, it should be mentioned that, where the house has been insured by the vendor, the benefit of the policy of insurance will not pass to the purchaser under the contract for sale of the house, unless expressly assigned to him; for the policy of insurance was altogether a collateral contract (*b*). And it should be especially noted that the benefit of a policy of insurance against fire is not, as a rule, assignable without the insurer's consent, for such policies usually take the form of a contract to indemnify the insured personally or his representatives in law, but not his assigns otherwise than by will (*c*). A vendor of

(*z*) *Poole* v. *Shergold*, 1 Cox, 273; *Magennis* v. *Fallon*, 2 Moll. 561, 591.

(*a*) See *Nelson* v. *Bridges*, 2 Beav. 239; *Brown* v. *Dibbs*, 25 W. R. 776, 37 L. T. N. S. 171; *Leppington* v. *Freeman*, 40 W. R. 348, 66 L. T. N. S. 357. As to the damages recoverable where minerals have been wrongfully gotten by wilful trespass or under a *bonâ fide* claim of title, see *Jegon* v. *Vivian*, L. R. 6 Ch. 742; *Livingstone* v. *Rawyards Coal Co.*, 5 App. Cas. 25; *Bulli, &c. Co.* v. *Osborne*, 1899, A. C. 351.

(*b*) *Paine* v. *Meller*, 6 Ves. 349, 352, 353; *Poole* v. *Adams*, 12 W. R. 683; *Rayner* v. *Preston*, 14 Ch. D. 297, 18 Ch. D. 1. The vendor remains entitled to recover the insurance money until the contract is executed by payment of the purchase money: *Collingridge* v. *Royal Exchange Assurance Corpn.*, 3 Q. B. D. 173.

(*c*) *Lynch* v. *Dalzell*, 4 Bro. P. C. 431; *Saddlers' Co.* v. *Badcock*, 2 Atk. 554; *Darrell* v. *Tibbitts*, 5 Q. B. D. 560; *Castellain* v. *Preston*, 11 Q. B. D. 380; *West of England, &c. Co.* v. *Isaacs*, 1897, 1 Q. B. 226; Bunyon on Fire Insurance, 11, 182, 303, 304; Porter on Insurance, 300, 2nd ed. There is nothing in the nature of a contract of fire insurance which makes it impossible to assign over the benefit thereof; policies of marine insurance which are equally contracts of indemnity, have always been made in favour of the insured and his assigns, and have been assignable accordingly; although, of course, at common law they were only indirectly assignable by means of a power of attorney: see Arnould on Marine Insurance, i. 107, 112, 231, 234, 6th ed.; Wms. Pers. Prop. 33, 34 and n. (*d*), 270—272, 15th ed.

land should, therefore, be very careful neither to assign to the purchaser the benefit of any existing contract of insurance against fire of any building thereon, nor to agree to hold any such policy on trust for the purchaser, except subject to the consent of the insuring office (*d*). For if the vendor make such an assignment or agreement without the consent of the office, and pending completion the house be burnt down, and he receive the insurance money and hand it over to the purchaser, or lay it out in rebuilding at the purchaser's request, he will be liable on receiving the full purchase money at the completion of the sale, to refund to the insurance office the amount paid by them (*e*); but it does not appear that he will have any cause of action to recover anything from the purchaser. And if the vendor, without having entered into any agreement with the purchaser, apply the money received under a policy of insurance against fire of a house burnt down pending completion in rebuilding or reinstating the house, it does not appear that he will be entitled to claim any increase of the purchase money on that account (*f*), and he will be equally liable to repay the amount of the insurance money to the insuring office on receiving the full price of the property sold (*g*). By a provision of the old Metropolitan Building Act, still remaining unrepealed, insurance offices are required, at the instance of any person interested in or entitled unto any houses

(*d*) For a form of stipulation appropriate to the case, see 1 Key & Elph. Prec. Conv. 282, 7th ed.

(*e*) *Castellain* v. *Preston*, 11 Q. B. D. 380.

(*f*) Above, p. 441.

(*g*) *Castellain* v. *Preston*, ubi sup. The principle is that a contract of insurance is a contract of indemnity, and the insurer, having made good the loss, is entitled by subrogation to the rights of the insured to the benefit of any compensation which the insured has a legal claim to exact from other sources. See also *West of England Fire Insurance Co.* v. *Isaacs*, 1897, 1 Q. B. 226. It is not, however, the usual policy of insurance offices to stand upon their strict legal rights where such a course would involve hardship to the insured: see Davidson's Concise Precedents, 113, n. (*a*), 17th ed.

or buildings damaged by fire, to cause the insurance money to be laid out in rebuilding or reinstating the same, unless within sixty days after the claim is adjusted the parties claiming the insurance money give security that the same shall be so laid out, or the money be disposed of among the contending parties to the satisfaction of the office (*h*). It has been held that the operation of this provision is general, and is not confined to houses or buildings within the limits of the metropolis (*i*), but the correctness of this decision has been questioned in the House of Lords (*k*). It seems very doubtful whether this enactment enables any person who has an interest in the building damaged, but has no independent claim to have the insurance money applied in reinstatement, to require the office to lay out the insurance money in rebuilding. Thus, where a lessee under covenant with his lessor to insure in their joint names to three-fourths of the value of the premises and to apply the insurance money in reinstatement, effected such insurance, but subsequently improved the premises and effected a further insurance in his own name, it was held that the money payable under such further insurance must be laid out at the lessor's request in reinstating the property (*l*). But it has been doubted by Lord Selborne in the House of Lords whether this enactment gives a mortgagor or subsequent incumbrancer any claim to require the money paid under an insurance made by a mortgagee to be

(*h*) Stat. 14 Geo. III. c. 78, s. 83. The person interested, desiring the insurance money to be applied in reinstatement must make a distinct request to that effect to the insurance office; otherwise the office may pay the money to the person who effected the insurance. The office is the proper party to rebuild, and a person interested, not being the person who effected the insurance, cannot after he has himself rebuilt claim the insurance money by virtue of this enactment: *Simpson* v. *Scottish Union Insurance Co.*, 1 H. & M. 618.

(*i*) *Ex parte Gorely*, 4 De G. J. & S. 477.

(*k*) *Westminster Fire Office* v. *Glasgow, &c. Socy.*, 13 App. Cas. 699, 716.

(*l*) *Ex parte Gorely*, ubi sup.

applied in reinstatement (*m*), and the doubt apparently extends to question the claim of a mortgagee to require reinstatement, where the insurance was effected by the mortgagor before the mortgage, and the mortgagor has not expressly agreed to apply the insurance money in reinstatement (*n*). If this doubt be well founded, it does not appear that where a house sold has been insured by the vendor and burnt down pending completion of the contract, the purchaser can under the above-mentioned enactment require the insurance money to be laid out in rebuilding, unless the vendor has expressly agreed to give him the benefit of the insurance or to lay out the money in reinstatement (*o*). It follows

(*m*) *Westminster Fire Office* v. *Glasgow, &c. Socy.*, 13 App. Cas. 699, 714.

(*n*) It is submitted that, independently of the enactment in question, a mortgagee has no right or equity to require any money received under an insurance effected by the mortgagor prior to the mortgage to be applied in making good the damage done, except where the mortgagor has contracted that the money shall be so applied and the benefit of that contract in effect forms part of the mortgagee's security, as where a lessee bound by covenant with the lessor to insure and apply the insurance money in re-instatement, insures accordingly and afterwards mortgages the demised premises: see *Garden* v. *Ingram*, 23 L. J. Ch. 478; *Lees* v. *Whiteley*, L. R. 2 Eq. 143; Wms. Conv. Stat. 156—159.

(*o*) The contrary is maintained in 1 Dart, V. & P. 197, written, however, before the case of *Westminster Fire Office* v. *Glasgow, &c. Socy.* It is there suggested that, unless the vendor expressly stipulate that, as regards all insurable loss or damage, the property shall be at the sole risk of the purchaser, as from the date of the contract, the vendor is liable to have the insurance money applied against his will at the purchaser's request in rebuilding and yet to refund the amount of the insurance money to the office on completion. It is, however, submitted that, even if the above enactment should be held to enable a person, interested in the building burnt but having no independent claim on the insurance money or its application, to require the office to lay out the money in reinstatement, in such case there would in effect be a statutory modification of the contract of insurance to the prejudice of the insurers. They would be under a statutory duty to lay out the money in rebuilding, which would indeed discharge them from the obligation of paying the vendor. But as the vendor, having previously parted with his beneficial interest in the property insured, would derive no benefit from the reinstatement, it is submitted that the principle of subrogation would not apply, and the vendor could not be called upon to refund on completion a sum of money which was neither paid to him nor laid out on *his* property: see above, p. 440; Davidson's Concise Precedents, 113, n. (*a*), 17th ed. (but the present writer doubts the safety to the vendor of the clause there suggested). It is submitted that there is no necessity for the vendor to make the stipulation suggested as above in Dart, V. & P.

Purchaser should insure himself against fire.

that where the property sold comprises valuable buildings, the purchaser should himself insure against fire as from the date of the contract for sale, unless it be arranged with the consent of the office that he shall have the benefit of the existing insurance.

Vendor's duty to take care of the property sold.

As the result of the purchaser's equitable ownership of the property sold and the vendor's consequent trusteeship for the purchaser, the vendor is bound, while he remains in possession of the property sold, to take reasonable care to preserve the property in the same condition in which it was at the date of the contract for sale (*p*). He must use the same care that a trustee ought to use with regard to the trust property, of which he is in possession; that is to say, he must take the same care as a prudent owner would take of his own property (*q*). Thus he must cultivate the lands, if in hand, in a husbandlike manner (*r*), keep the property in a reasonable state of repair (*s*) and take proper precautions against injury to the lands by trespassers (*t*); and if he fail in any of these duties, the purchaser will be entitled to an allowance by way of compensation to be deducted from the purchase money (*u*), or in case of his completing the purchase in ignorance of the vendor's breach of duty he may sue the vendor for damages for the loss sustained thereby (*x*). As a rule, the vendor is bound to execute at his own expense such repairs as are necessary in order to preserve the property sold from deterioration until the proper time for completion of

(*p*) Above, p. 41, and n. (*l*).

(*q*) *Wilson* v. *Clapham*, 1 J. & W. 36, 38; *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517, 537.

(*r*) *Foster* v. *Deacon*, 3 Madd. 394.

(*s*) *Binks* v. *Rokeby*, 2 Swanst. 222, 226; *Lord* v. *Stephens*, 1 Y. & C. 222; *Townsend* v. *Champernowne*, 3 Y. & C. 505, 508; *Regent's Canal Co.* v. *Ware*, 23 Beav. 575, 588; *Royal Bristol, &c. Bdg. Socy.* v. *Bomash*, 35 Ch. D. 390, 397, 398.

(*t*) *Clarke* v. *Ramuz*, 1891, 2 Q. B. 456.

(*u*) See note (*s*), above.

(*x*) *Clarke* v. *Ramuz*, ubi sup.

the contract (*y*). As we have seen (*z*), this time is, under an open contract, the time at which a good title shall have been shown; and the vendor's obligation of keeping the property in a good state of preservation up to that time at his own expense appears to fall on him because until then he remains entitled as owner to the ordinary profits and must discharge the current outgoings (*a*). When the contract has fixed a particular day for completion, and completion is delayed beyond that time by reason of the title not having been made out, the vendor is bound, as a rule, to preserve the property from deterioration at his own expense until the time when the purchaser may reasonably take possession, that is, until a good title be shown (*b*). The vendor is not, however, bound to improve the property, and he should be careful not to expend money on improvements, as he will have no right to recover any sums so expended from the purchaser, unless the purchaser should have authorised such expenditure (*c*). If the state of the property sold be such that an extraordinary outlay, beyond what may properly be regarded as current outgoings, should be necessary to be made in lasting repairs in order to preserve the property from deterioration, it appears that the vendor ought to be allowed his expenses properly incurred for such purpose (*d*). If by reason of the purchaser's default in completing the contract the property remain in the vendor's possession after the time when the purchaser might reasonably have taken

(*y*) See note (*s*) above; *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517, 532, 534, 539.

(*z*) Above, pp. 22, 37.

(*a*) Above, p. 41. An absolute trustee would, of course, be entitled to be reimbursed all moneys *properly* expended in preserving the trust property, and would not be bound to pay for any repairs out of his own pocket, if he had no trust money in hand available for the purpose: see *Bridge* v. *Brown*, 2 Y. & C. C. C. 181, 191, 192; *Fazakerley* v. *Culshaw*, 19 W. R. 793; *Re De Teissier's Settled Estates*, 1893, 1 Ch. 153; *Re Montagu*, 1897, 2 Ch. 8.

(*b*) *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517, 532, 539.

(*c*) Above, p. 441.

(*d*) *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517, 532; *Phillips* v. *Silvester*, L. R. 8 Ch. 173, 176.

possession, the purchaser will not be entitled to any allowance or compensation for any deterioration which the property may have suffered since that time (*e*). If the property sold be let to yearly or other tenants, the vendor must manage the same as a prudent owner would in the interval between the making of the contract and its completion, and see that the tenants duly perform their obligations (*f*). He should not allow the rents to fall into arrear (*g*): but he may reduce them, where a prudent owner would find it necessary to do so (*h*). If any tenancy of lands usually let determine during the interval in question, the vendor ought to notify the vacancy so occurring to the purchaser, and unless the purchaser should express a wish that the lands should remain unlet and promise to indemnify the vendor against loss on this account in case of the purchase going off, the vendor ought to take steps to re-let the lands. And the vendor should do this, whether the tenancy expired by effluxion of time or by reason of a notice to quit served by the vendor at the purchaser's request (*i*). So the vendor should not, as a rule, determine any existing tenancy, unless the purchaser desire it (*k*). When a sale of land is not actually completed, under an open contract at the proper time for completion (*l*), or otherwise on the day fixed for completion (*m*), the vendor is entitled to remain in possession until the sale is actually completed by payment of the purchase money (*n*), whether the delay in completion be due to the state of the title or to the purchaser's default

Vendor entitled to retain possession until actual completion.

(*e*) *Binks* v. *Rokeby*, 2 Swanst. 222, 226; *Minchin* v. *Nance*, 4 Beav. 332.

(*f*) *Foster* v. *Deacon*, 3 Madd. 394, 395.

(*g*) *Aeland* v. *Gaisford*, 2 Madd. 28, 32; *Wilson* v. *Clapham*, 1 J. & W. 36, 38.

(*h*) *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517, 537.

(*i*) *Egmont* v. *Smith*, 6 Ch. D. 469; and see *Bennett* v. *Stone*, 1902, 1 Ch. 226, 237, affirmed, 1903, 1 Ch. 509.

(*k*) *Raffety* v. *Schofield*, 1897, 1 Ch. 937, 944, 945.

(*l*) Above, pp. 22, 37.

(*m*) Above, p. 47.

(*n*) Above, p. 440.

in payment; unless, of course, the contract be that the purchaser shall have possession on a day named irrespectively of the completion of the purchase (*o*). But, as we have seen (*p*), when the purchase is not completed at the proper time or appointed day, the purchaser is entitled to the rents and profits, and is bound to pay interest on the purchase money, if he bought under an open contract, from the time when a good title was shown; if he bought under a contract fixing a day for completion, but not expressly providing for payment of interest, from the same time; and if he bought under a contract to pay interest on failure *from any cause whatever* to complete on the appointed day, as from that day. In such cases, therefore, the vendor must account to the purchaser for the rents and profits received by him from the date when the purchaser so became entitled to them until the date of actual completion, and the amount so received must be deducted from the amount of purchase money and interest payable (*q*). In taking such account the vendor is, as a rule, chargeable only with the amount of the rents actually received by him or for his use (*r*): but he may in a special case be chargeable with the amount which, but for his wilful default, he might have received, as where he has allowed the rents to fall into arrear (*s*), or neglected to let the land (*t*), or has wantonly abandoned the property sold (*u*).

Vendor's liability to account for the rents.

(*o*) See *Gedye* v. *Montrose*, 26 Beav. 45.

(*p*) Above, pp. 41, 49, 50, 56, 57.

(*q*) See *M'Namara* v. *Williams*, 6 Ves. 143.

(*r*) *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517; Seton on Decrees, 2237, 6th ed.; *Bennett* v. *Stone*, 1902, 1 Ch. 226, affirmed, 1903, 1 Ch. 509.

(*s*) *Wilson* v. *Clapham*, 1 J. & W. 36.

(*t*) *Bennett* v. *Stone*, 1902, 1 Ch. 226, 237.

(*u*) *Phillips* v. *Silvester*, L. R. 8 Ch. 173. In that case there certainly appears to have been such wanton negligence on the vendors' part as justified a decree against them on the footing of wilful default; but Lord Selborne's remarks comparing the position of a vendor retaining possession until completion to that of a mortgagee in possession are directly opposed to the grounds of the decision in *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517. It is submitted that

The vendor's rights.

As we have seen (*x*), the vendor's beneficial interest in the property sold between the making of the contract for sale and its completion consists, first, in his lien for the price, involving the right to hold possession of the land sold until the whole purchase money be paid; and secondly, in his right to take the ordinary rents and profits for his own use up to the proper time for completion. As to the first of these rights, the vendor is entitled to retain possession until the whole price is paid, unless the contract contain an express or implied stipulation that the purchaser shall have possession on a particular day without making such payment (*y*). And where the contract provides, as upon a sale by auction under the usual conditions (*z*), that the balance of the purchase money shall be paid on a particular day, and also that possession shall be taken by the purchaser on that day, it is held that such possession is intended as may be safely taken on the one hand and given on the other, and time is not, as a rule, of the essence of the contract; and as the purchaser is not bound to take possession until he can safely do so, that is, until a good title has been shown, so the vendor cannot be compelled to deliver up possession without receiving payment of the whole price (*a*). If, however, the contract provide in such manner that time is either expressly or impliedly of the essence of the stipulation, that possession shall be given to the purchaser on a certain day, the purchaser is entitled to take possession on that day without paying the purchase money (*b*).

these remarks of Lord Selborne were not necessary to his decision and are not good law, although, in other respects the decision appears to have been right. See 2 Dart, V. & P. 733—735; *Royal Bristol, &c. Bldg. Socy.* v. *Bomash*, 35 Ch. D. 390, 397, 398; *Clarke* v. *Ramuz*, 1891, 2 Q. B. 456.

(*x*) Above, p. 440.

(*y*) Above, p. 448; *Lysaght* v. *Edwards*, 2 Ch. D. 499, 506.

(*z*) Above, pp. 47, 56, 61, 62.

(*a*) *Tilley* v. *Thomas*, L. R. 3 Ch. 61; *Phillips* v. *Silvester*, L. R. 8 Ch. 172, 176—178.

(*b*) *Gedye* v. *Montrose*, 26 Beav. 45.

Vendor's right to the profits.

The profits which the vendor is entitled to take up to the proper time for completion are the ordinary casual profits arising in the course of the proper management of the estate—those which a tenant for life impeachable for waste would be entitled to take as against the remainderman (*c*). Thus, if the land sold be in hand, the vendor is entitled to gather in the crops in the due and proper course of husbandry, and to dispose of them for his own benefit (*d*); and if the land be let, he is entitled to receive the rents as they become payable (*e*). And, usually by express contract (*f*), but, if not, under the Apportionment Act, 1870 (*g*), he is entitled to an apportioned part, up to the proper time for completion, of the current rents which will become payable after that time. So the vendor may work mines and quarries open at the time of sale (*h*). But he is not otherwise entitled to take any profit or benefit which forms part

(*c*) This comparison appears to be correct as a general rule. But it has been held, where a manor containing copyholds was sold by order of the Court of Chancery and copyhold tenants died or alienated before the date on which it was ordered that the purchaser should be let into possession, but the admissions so rendered necessary were not granted until after such date, that the fines upon such admissions were to be considered as having accrued before that date and were therefore payable to the vendor: *Garrick* v. *Camden*, 2 Cox, 231. And it has been said that the same principle is applicable on a sale made out of Court: *Cuddon* v. *Tite*, 1 Giff. 395, where, however, the admission was taken before the date fixed for completion. It is submitted that the principle laid down in *Garrick* v. *Camden* is anomalous and ought not to be followed in a case where copyholders have died or alienated in the lifetime of a tenant for life of the manor, but the admissions consequent thereon have not been granted until after his death. For it is well settled that, as between copyholder and lord, no fine is due until admittance, and admittance is the act of the lord for the time being and is compellable by him: *Hobart and Hammond's case*, 4 Rep. 27b; *R.* v. *Hendon*, 2 T. R. 484; *Graham* v. *Sime*, 1 East, 632; *R.* v. *Wellesley*, 2 E. & B. 924; *Monckton* v. *Payne*, 1899, 2 Q. B. 603; 1 Wat. Cop. 317, 346, 347, 7th ed.; 1 Scriv. Cop. 111, 118, 283, 3rd ed.

(*d*) *Webster* v. *Donaldson*, 34 Beav. 451, 11 Jur. N. S. 404; it appears from the latter report that the stipulation that the growing crops should be included in the sale was held to be controlled by the provision that the purchaser should be entitled to the profits only as from the day fixed for completion.

(*e*) Above, p. 41, and n. (*j*).

(*f*) Above, pp. 56, 61.

(*g*) Stat. 33 & 34 Vict. c. 35, s. 2.

(*h*) Above, p. 442, and n. (*a*).

of the inheritance (*i*), and if he diminish the value of the inheritance by committing any voluntary waste, as by felling timber or working an unopened mine, the purchaser may claim compensation for the damage; or, if the waste be such as affects a material alteration in the property sold (for example, the felling of ornamental timber), the purchaser may repudiate the contract altogether (*k*). It appears that if the purchaser sue for specific performance of the contract, he may obtain an injunction restraining the vendor from the commission, pending completion, of any act tending to destroy or depreciate the inheritance of the land sold (*l*). Thus, on the sale of an advowson, if the church became vacant pending completion, the vendor may be restrained from presenting his own nominee to the living (*m*). And the vendor may be so restrained from selling the land to another, or from making any disposition of the legal estate therein to the prejudice of the purchaser (*n*). And on the same principle it would appear that the vendor may be restrained from wasting the property sold pending completion. But if the vendor dispute the fact that any contract for sale was made as alleged by the purchaser, the Court will not grant an injunction restraining the vendor from the exercise of any of his legal rights of ownership, unless the balance of convenience be obviously in favour of such a course (*o*).

Vendor remaining in possession

If, as is frequently the case, there be a day fixed for completion and a contract to pay interest on failure

(*i*) Above, pp. 441, 442.

(*k*) *Magennis* v. *Fallon*, 2 Moll. 561, 590; 1 Dart, V. & P. 286, 507.

(*l*) See *Shrewsbury and Chester Rail. Co.* v. *Shrewsbury and Birmingham Rail. Co.*, 15 Jur. 548, 550; *Hadley* v. *London Bank of Scotland*, 3 De G. J. & S. 63, 70, 71; *London & County Bank* v. *Lewis*, 21 Ch. D. 490; Sug. V. & P. 228, 229.

(*m*) *Nicholson* v. *Knapp*, 9 Sim. 326; above, p. 392, and n. (*q*).

(*n*) *Echliff* v. *Baldwin*, 16 Ves. 267; *Curtis* v. *Buckingham*, 3 V. & B. 168; *Spiller* v. *Spiller*, 3 Swanst. 556.

(*o*) *Turner* v. *Wight*, 4 Beav. 40; *Hadley* v. *London Bank of Scotland*, 3 De G. J. & S. 63.

after the date fixed for completion.

to complete on that day, either from any cause whatever or from any other cause than the vendor's wilful default, and the vendor remain in possession after the time fixed for completion because a good title has not yet been shown, he ought, as we have seen (*p*), to cultivate the land sold, gather in the crops, and generally manage the property with the care of a prudent owner, but must account to the purchaser for the profits from the time fixed for completion until the date of actual completion, receiving instead interest on the purchase money. And where he is in actual occupation of any part of the property, he is chargeable with a fair occupation rent (*q*). During this period the outgoings, including the expenses of cultivation or management, fall upon the purchaser in the absence of express stipulation to the contrary, and the vendor is entitled to charge them against the purchaser in account (*r*). But if the vendor so remain in possession after he has shown such a title as the purchaser ought to accept, because of the purchaser's default in completing the contract, the vendor will not be liable for any subsequent deterioration

(*p*) Above, pp. 446—449.

(*q*) *Dyer* v. *Hargrave*, 10 Ves. 505, 511; *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517, 532, 533, 538, 539; above, p. 42. It appears, however, that in an action for specific performance of a contract under which the vendor has so remained in actual occupation of the land sold, the order should direct an inquiry whether he has so occupied, and if so, that an annual value by way of rent should be set thereon: *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517, 538, 539; Seton on Judgments, 2244, 6th ed. If this be omitted the vendor cannot be charged with an occupation rent under the usual order for an account of the rents and profits received by him or for his use (see above, p. 449); but where the land so occupied is in cultivation, he is chargeable with the proceeds of crops sold, less the expenses of realizing the same: *Bennett* v. *Stone*, 1902, 1 Ch. 226, 237, 238, affirmed, 1903, 1 Ch. 509.

(*r*) Above, pp. 440, 447; *Barsht* v. *Tagg*, 1900, 1 Ch. 231, 235; *Bennett* v. *Stone*, 1902, 1 Ch. 226, 1903, 1 Ch. 509. But the vendor cannot, under the account usually directed in actions for specific performance of rents and profits received by or for him (not upon the footing of wilful default), charge the purchaser with losses incurred in carrying on farming business on a farm which was let at the date of the contract, but afterwards fell vacant and was occupied and farmed by the vendor: *Bennett* v. *Stone*, ubi sup.

of the property sold, though he must, of course, still account for the rents and profits until the actual completion of the sale (*t*). Where, however, completion is delayed by the purchaser's default, and the vendor is, on that account and to his own inconvenience, obliged to remain in actual occupation of any part of the property sold, the vendor will not be charged with any occupation rent therefor, and the purchaser is nevertheless liable to discharge the outgoings and to pay interest (*u*).

The vendor's duty to discharge the outgoings.

As we have seen (*x*), the vendor is, usually by express contract, but if not, by law, liable to discharge all outgoings payable in respect of or charged upon the property sold up till the time for completion of the purchase, and this obligation appears to be correlative to his right to enjoy the profits up till that time. He must therefore pay out of his own pocket all rates, taxes, tithe rent-charge and rent (whether quit-rent of freeholds or copyholds or rent of leaseholds sold), accruing due in respect of the property sold before the time for completion of the purchase, also all ordinary expenses of cultivating or managing the property and keeping the same in a due state of preservation, including the cost of ordinary repairs (*y*). The outgoings so payable by the vendor also include all sums of money which, before the time for completion, have become charged by statute upon the property sold or recoverable by distress or otherwise from the owner or occupier thereof

(*t*) Above, pp. 447, 448; *Bennett* v. *Stone*, 1902, 1 Ch. 226, affirmed, 1903, 1 Ch. 509.

(*u*) *Dakin* v. *Cope*, 2 Russ. 170; *Leggott* v. *Metropolitan Rail. Co.*, L. R. 5 Ch. 716; also deciding that in such circumstances the purchaser cannot be charged with the vendor's losses, and the vendor is not liable to account for his profits in respect of a business carried on by him on the premises during such occupation thereof.

(*x*) Above, pp. 41, 56, 62, 440, 447.

(*y*) *Carredus* v. *Sharp*, 20 Beav. 56; above, p. 447.

for the time being (*z*); and this is the case whether the vendor have expressly contracted to discharge the outgoings or not (*a*). Thus, it has been held that the vendor must pay the expenses so charged on the property sold of paving, draining, or lighting the adjoining street under a local Improvement Act (*b*), the Public Health Act, 1875 (*c*), or the Private Street Works Act, 1892 (*d*), or of removing a dangerous structure under the Metropolitan Building Acts, 1855 and 1869 (*e*), or the London Building Acts, 1894 and 1898 (*f*), and the same law seems applicable to the cost of abating a nuisance under the Public Health (London) Act, 1891 (*g*). Outgoings so charged by statute upon the land sold, whether by express words or impliedly by reason of their being recoverable by distress upon or other process of law against the land, are payable by the vendor if the statutory charge arise before the time for completion, even though the money secured by the charge should not become actually payable until after that date; and if the purchaser be obliged to pay the same after completion, he can recover the amount from the vendor either under an *express* stipulation in the contract for sale that the vendor shall discharge the outgoings up to the time fixed for completion (*h*) or under a covenant against incumbrances contained or implied by statute (*i*) in the conveyance (*k*). Where such outgoings are not so charged by statute upon the property sold, but are

(*z*) Above, p. 41 and n. (*m*); *Stock* v. *Meakin*, 1900, 1 Ch. 683.

(*a*) *Re Betteswortb and Richer*, 37 Ch. D. 535; *Barsht* v. *Tagg*, 1900, 1 Ch. 231, 234, 235.

(*b*) *Midgley* v. *Coppock*, 4 Ex. D. 309.

(*c*) *Re Betteswortb and Richer*, 37 Ch. D. 535.

(*d*) *Stock* v. *Meakin*, 1900, 1 Ch. 683.

(*e*) *Tubbs* v. *Wynne*, 1897, 1 Q. B. 74.

(*f*) *Re Highett and Bird's Contract*, 1902, 2 Ch. 214, 1903, 1 Ch. 287; as to which case, see above, p. 354.

(*g*) *Barsht* v. *Tagg*, 1900, 1 Ch. 231, 234, 235.

(*h*) *Midgley* v. *Coppock*, 4 Ex. D. 309; *Tubbs* v. *Wynne*, 1897, 1 Q. B. 74.

(*i*) Stat. 44 & 45 Vict. c. 41, s. 7.

(*k*) *Stock* v. *Meakin*, ubi sup.

merely recoverable by suing the owner thereof for the time being personally, it appears that the vendor ought to pay them if they fall due before the time for completion; but if he do not, and the purchaser be obliged to pay, the amount paid cannot be recovered from the vendor after completion under a covenant by him against incumbrances, as there is no liability affecting the land (*l*). It appears, however, that the purchaser is entitled to refuse to complete the contract until such outgoings are paid (*m*), and that he can recover any money which he is obliged to pay on this account after completion if the contract for sale contained an express stipulation that the vendor should discharge all outgoings up to the time fixed for completion (*n*). If, however, the contract for sale contain no such express stipulation and be completed without the vendor discharging such outgoings, it is a question whether the purchaser, being subsequently obliged to pay them, have any remedy to recover the amount expended from the vendor (*o*).

Apportion-

As we have seen (*p*), contracts for the sale of land

(*l*) *Egg* v. *Blayney*, 21 Q. B. D. 107.

(*m*) See *Re Betteswortb and Richer*, 37 Ch. D. 535.

(*n*) *Midgley* v. *Coppock*, 4 Ex. D. 309; *Tubbs* v. *Wynne*, 1897, 1 Q. B. 74.

(*o*) See *Egg* v. *Blayney*, 21 Q. B. D. 107, where it seems that the vendor ought to have paid the amount claimed as outgoings; but the only point argued and decided was that the purchaser could not recover under the vendor's covenant against incumbrances. *Quære* whether, when land is sold under an open contract, the contract is so entirely merged in the conveyance as to prevent the purchaser from recovering after completion outgoings which the vendor ought to have, but has not paid, under the implied stipulation that the vendor shall discharge all outgoings up to the time for completion. This stipulation is not in any way carried out, nor is the object thereof performed by the conveyance of the property to the purchaser; it would certainly survive if put into *express* words. Why, then, should it be extinguished merely because it is implied by law? See *Palmer* v. *Johnson*, 13 Q. B. D. 351, 356, 357, 359. In *Clarke* v. *Ramuz*, 1891, 2 Q. B. 456, an action was successfully maintained by a purchaser against a vendor after completion for a breach before completion of the vendor's implied duty to take proper care of the land sold: above, p. 416.

(*p*) Above, pp. 56, 62.

usually contain an express stipulation that the outgoings shall, if necessary, be apportioned between the vendor and purchaser up to the time fixed for completion. Where this is the case, all such outgoings as in their nature extend over and are attributable to a definite period of time, such as yearly taxes or half-yearly rates, should, it appears, be apportioned, even though they may not be apportionable by law (*q*). If the contract contain no such stipulation, such outgoings only can be apportioned between the parties as are apportionable by law (*r*).

ment of outgoings.

If the purchaser take possession of the property sold before completion of the contract, either in pursuance of a stipulation to that effect expressed or implied in the contract or with the vendor's consent given after the contract, he will, unless the contrary be expressly agreed, as from the time of his entry into possession, be entitled to take the ordinary rents and profits for his own use, and be liable to bear the outgoings and to pay interest on the purchase money (*s*). But as we have seen (*t*), where there is no express contract to pay interest, the purchaser may, in case of delay attributable to the vendor in completing the purchase, discharge himself from his liability to pay interest by appropriating his money to the purchase and giving the vendor notice of such appropriation. Where the purchaser is so let into possession before completion, the vendor, of course, retains his legal estate in the property sold until

Purchaser taking possession before completion.

(*q*) See *Lawes* v. *Gibson*, L. R. 1 Eq. 135, as to rent before the Apportionment Act, 1870 (it is presumed that a stipulation for apportionment was implied from the contract to *clear* the outgoings); *Midgley* v. *Coppock*, 4 Ex. D. 309, 313.

(*r*) *Midgley* v. *Coppock*, 4 Ex. D. 309, 313.

(*s*) *Powell* v. *Martyr*, 8 Ves. 146, 149; *Fludyer* v. *Cocker*, 12 Ves. 25; *A.-G.* v. *Christ Church*, 13 Sim. 214; *Birch* v. *Joy*, 3 H. L. C. 565, 591; *Ballard* v. *Shutt*, 15 Ch. D. 122; *Fletcher* v. *Lancashire, &c. Rail. Co.*, 1902, 1 Ch. 901, 908.

(*t*) Above, pp. 42, 57.

he parts with it by conveyance to the purchaser; but his only beneficial interest in the property sold is his equitable lien for the price, and in equity he holds his legal estate as security only for payment of the purchase money (*u*). In equity, the purchaser is the owner of the property, subject to the vendor's lien and to the condition that a good title shall be shown (*x*). It appears, therefore, that in such case the purchaser is, as a rule, entitled to exercise all ordinary acts of ownership over the property sold; for the very purpose of putting the purchaser into possession is to enable him to act as owner (*y*). But he may be restrained by injunction from the commission or continuance of any such act of waste as will depreciate the vendor's security for payment. In this respect the purchaser's position resembles that of a mortgagor in possession (*z*). If the purchaser take possession before completion without the vendor's leave, he may be ejected and restrained by injunction from re-entry, or from the commission of waste as a mere trespasser may (*a*). The question to what extent the purchaser's entry into possession before completion may be a waiver of objection to the title has been already considered (*b*).

Purchaser already in possession as vendor's tenant.

If at the date of the contract for sale the purchaser be in possession of the property sold as tenant to the vendor from year to year or for any other term, and the contract is subject to the usual condition that the vendor shall show a good title, the tenancy is not determined at law pending completion of the contract (*c*); though

(*u*) *Smith* v. *Hibbard*, 2 Dick. 730; *Ecclesiastical Commrs.* v. *Pinney*, 1899, 2 Ch. 729, 1900, 2 Ch. 736.

(*x*) Above, pp. 438—440.

(*y*) *Burroughs* v. *Oakley*, 3 Swanst. 159, 170.

(*z*) *Crockford* v. *Alexander*, 15 Ves. 138; *Humphreys* v. *Harrison*, 1 J. & W. 581; *King* v. *Smith*, 2 Hare, 239, 244; *Goodman* v. *Kine*, 8 Beav. 379; Wms. Real Prop. 535, 19th ed.

(*a*) See *Crockford* v. *Alexander*, 15 Ves. 138.

(*b*) Above, pp. 151, 152.

(*c*) *Doe* d. *Gray* v. *Stanion*, 1 M. & W. 695; *Tarte* v. *Darby*, 15 M. & W. 601.

in equity the purchaser, of course, has the rights incident to his position under the contract (*d*). And it appears that in such case, in the absence of stipulation to the contrary, the purchaser will be entitled to the rents and profits and liable to pay interest on the purchase money as from the date of the contract, notwithstanding that the contract be conditional on the vendor's showing a good title (*e*). If at the date of the contract the purchaser be in possession as tenant at will to the vendor, it appears that the tenancy is determined by the contract, and that thenceforth the purchaser is to be treated as being in possession under the contract (*f*).

Orders for purchaser in possession to pay price into Court or give up possession.

If an action be brought for the specific performance (*g*) of a contract for the sale of land and the purchaser be in possession, he may be ordered, pending the trial of the action, to pay the purchase money into Court, or at his election either to pay the money into Court or to give up possession. The Court makes such orders for the preservation of the property, which is the subject of the action, considering it unjust to allow the purchaser to have both the land and the purchase money in his possession pending the trial. Thus, if the purchaser exercise any act of ownership, such as felling timber or working mines, which impairs the vendor's security for payment of the price, he will be ordered to pay the purchase money into Court without having the option of giving up possession instead; and this is the case, whether the purchaser were put into possession pursuant

(*d*) Above, p. 438; *Daniels* v. *Davison*, 16 Ves. 249, 253.

(*e*) *Townley* v. *Bedwell*, 14 Ves. 590, 597; *Daniels* v. *Davison*, 16 Ves. 249, 253; see *Mills* v. *Haywood*, 6 Ch. D. 196.

(*f*) *Daniels* v. *Davison*, 16 Ves. 249, 252, 253.

(*g*) The orders here mentioned will not be made at the instance of a vendor suing for rescission of the contract; but other proper orders for the preservation of the property in dispute may be made in such an action: *Cook* v. *Andrews*, 1897, 1 Ch. 266.

to the contract or with the vendor's consent given after the contract (*h*). And where the vendor has shown such a title as the purchaser ought to accept, or the purchaser has accepted the vendor's title, the purchaser being in possession will be ordered to pay the purchase money into Court (*i*). Where the purchaser being in possession has done nothing to diminish the value of the property, he will not be ordered to pay the purchase money into Court without being offered the alternative of giving up possession (*k*); but it appears that, where he has been let into possession with the vendor's leave but not under the contract, he will, as a rule, be ordered to elect within a specified time whether he will pay the money into Court or give up possession, notwithstanding that a good title has not yet been shown (*l*), unless there be delay in making out the title attributable to the vendor's *laches* (*m*). Where the purchaser has been put into possession pursuant to the contract for sale, the Court will not, in general, so put him to his election (*n*). And where the purchaser's right to possession is referable to some other title than that conferred by the contract or the vendor's leave given after the contract, as where he entered under a lease granted to him prior to the sale, there appears to be no ground for requiring him to elect as above mentioned (*o*).

(*h*) *Dixon* v. *Astley*, 19 Ves. 564, 1 Mer. 133; *Cutler* v. *Simons*, 2 Mer. 103; *Bradshaw* v. *Bradshaw*, ib. 492; *Bramley* v. *Teal*, 3 Madd. 219; *Pope* v. *Great Eastern Rail. Co.*, L. R. 3 Eq. 171; *Lewis* v. *James*, 32 Ch. D. 326, 330.

(*i*) *Bradshaw* v. *Bradshaw*, 2 Mer. 492, 493; *Crutchley* v. *Jerningham*, ib. 502; *Wood* v. *Edwards*, 1876, W. N. 15.

(*k*) *Greenwood* v. *Turner*, 1891, 2 Ch. 144.

(*l*) *Clarke* v. *Wilson*, 15 Ves. 317; *Gibson* v. *Clarke*, 1 V. & B. 500; *Smith* v. *Lloyd*, 1 Madd. 83; *Wickham* v. *Evered*, 4 Madd. 53; *Younge* v. *Duncombe*, Younge, 275; *Tindal* v. *Cobham*, 2 My. & K. 385; *Fowler* v. *Ward*, 6 Jur. 547.

(*m*) *Fox* v. *Birch*, 1 Mer. 105.

(*n*) *Gibson* v. *Clarke*, 1 V. & B. 500, 501; *Morgan* v. *Shaw*, 2 Mer. 138; *Gell* v. *Watson*, 3 Madd. 225; *Pryse* v. *Cambrian Rail. Co.*, L. R. 2 Ch. 444.

(*o*) *Bonner* v. *Johnston*, 1 Mer. 366; *Freebody* v. *Perry*, G. Coop. 91. Note that in *Greenwood* v. *Turner*, 1891, 2 Ch. 144, the lease under which the purchaser claimed to be in possession had expired at the time of the motion.

§ 2.—*Of the Transfer pending Completion of the Rights and Liabilities under the Contract.*

Transfer pending completion of the rights and liabilities under the contract.

We will now consider the effect of the transfer of the rights and liabilities created by the contract pending the completion thereof. This may take place either involuntarily, which is mainly by act of law, or voluntarily, that is, by act of the parties. The former case occurs upon the death, bankruptcy or personal incapacity supervening since the contract of either party thereto, and on the land sold being taken in execution of a judgment against the vendor; the latter upon the assignment *inter vivos* by either party of his rights under the contract. We will consider each of these cases in turn, first, as regards the vendor, and, secondly, with respect to the purchaser, premising that the contract, once validly concluded, is not avoided by the death, bankruptcy, or supervening incapacity of either party thereto, and remains, as a rule, enforceable not only at law but specifically in equity at suit of either party thereto, his representatives in law or assigns, against the other party or his representatives in law (*p*). The contract is also specifically enforceable against the vendor's assigns *inter vivos* of the land other than those who have taken the legal estate therein as purchasers in good faith for valuable consideration actually paid or executed without notice of the contract (*q*).

Death of the vendor.

On the vendor's death, his rights under the contract pass to his executors or administrators, who are the

(*p*) *Baden* v. *Pembroke*, 2 Vern. 213; *Owen* v. *Davies*, 1 Ves. sen. 82; *Hinton* v. *Hinton*, 2 Ves. sen. 631, 633; *Taylor* v. *Stibbert*, 2 Ves. jun. 437, 439; *Brooke* v. *Hewitt*, 3 Ves. jun. 253; Sug. V. & P. 175, 208; 1 Dart, V. & P. 291, 1114, 1115; Fry, Sp. Perf. 91, 96, 105, 124, 3rd ed.; 84, 85, 90, 98, 116, 4th ed.; *Pearce* v. *Bastable's Trustee*, 1901, 2 Ch. 122.

(*q*) *Daniels* v. *Davison*, 16 Ves. 249, 17 Ves. 433; *Potter* v. *Sanders*, 6 Hare, 1; 1 Dart, V. & P. 927, 928, 1115.

proper persons to sue upon the contract either for damages at law or for specific performance in equity (*r*). But in order to reap the benefit of the contract, the personal representatives must, of course, procure the performance of the vendor's part of the agreement—that is, the conveyance to the purchaser of the land sold—and it is therefore necessary to consider upon what persons the vendor's estate in the land sold devolves upon his death pending completion. This depends upon the nature of the property sold. If it were freehold in fee the vendor's estate therein formerly passed, on his death before completion, to his heir or devisee, according as he had left the same to descend or disposed thereof by his will; and the heir or devisee was obliged to convey the estate to the purchaser (*s*). The vendor's estate would not only go to a specific devisee thereof, but might also pass under a general devise of all his real estate, if the purposes of such a devise were not inconsistent with this construction (*t*). If, however, the vendor had devised all his real estate generally to one, and all estates held by him upon any trust to another, it was a question how far the estate sold was held by the vendor upon a trust so as to pass under the devise of his trust estates. Where the title had been accepted prior to the vendor's death, it was held that the property was vested in him upon a trust, and so passed under a devise of his trust estates; but it appears that if the vendor had died prior to the acceptance of the title, the property sold would not have been held by him upon an absolute trust, for the con-

Devolution of the vendor's estate.

Freeholds in fee.

(*r*) *Baden* v. *Pembroke*, 2 Vern. 212; *Eaton* v. *Sanxter*, 6 Sim. 517; *Roberts* v. *Marchant*, 1 Ph. 370; *Hoddel* v. *Pugh*, 33 Beav. 489; Sug. V. & P. 177; 1 Dart, V. & P. 293, 1130; Fry, Sp. Perf. 91, 3rd ed.; 84, 85, 4th ed.

(*s*) The heir or devisee was a necessary party to a suit for specific performance of the contract, both on this account and as having an interest in disputing the contract: see previous note.

(*t*) See *Wall* v. *Bright*, 1 J. & W. 494; *Lysaght* v. *Edwards*, 2 Ch. D. 499, 510—513; 1 Jarm. Wills, 693, 703—706, 4th ed., 647, 654—657, 5th ed.

tract had not yet become unconditionally binding on him, and so the land would have passed to his general devisee (*u*). Under the Land Transfer Act, 1875 (*x*), freeholds or copyholds held in fee and sold might have passed, on the vendor's death and intestacy, to his legal personal representative, if he had been a *bare* trustee thereof; but this would only have been the case where the title had been accepted and the purchase money paid (*y*). Under the Conveyancing Act of 1881 (*z*), freeholds held in fee and sold may pass, on the vendor's death before completion, to his legal personal representatives, notwithstanding any testamentary disposition thereof, if they were vested in the vendor upon a trust within the meaning of sect. 30 of that Act. This is the case if the title had been accepted and the purchase money paid before the vendor's death (*a*); and apparently it is so, if before his death the contract had become unconditionally binding on the parties by reason of the purchaser's acceptance of the title (*b*), but this point has not been precisely so decided. Under the same Act (*c*), however, where at the death of any person there is subsisting a contract enforceable against his heir or devisee for the sale of the fee simple or other freehold interest descendible to his heirs general in any land, his personal representatives shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death in any manner

(*u*) *Lysaght* v. *Edwards*, 2 Ch. D. 499.

(*x*) Stat. 38 & 39 Vict. c. 87, s. 48, replacing 37 & 38 Vict. c. 78, s. 5 (above, p. 181), and repealed by 44 & 45 Vict. c. 41, s. 30.

(*y*) *Morgan* v. *Swansea Urban, &c. Authority*, 9 Ch. D. 582; *Re Cunningham and Frayling*, 1891, 2 Ch. 567; see *Re Cuming*, L. R. 5 Ch. 72.

(*z*) Stat. 44 & 45 Vict. c. 41, s. 30; above, p. 183.

(*a*) *Re Cuming*, L. R. 5 Ch. 72.

(*b*) See *Lysaght* v. *Edwards*, 2 Ch. D. 499; *Re Pagani*, 1892, 1 Ch. 236.

(*c*) Stat. 44 & 45 Vict. c. 41, s. 4, applying only in cases of death after the 31st December, 1881, and providing that a conveyance made thereunder shall not affect the beneficial rights of any person claiming under any testamentary disposition, or as heir or next of kin of a testator or intestate.

proper for giving effect to the contract. Under this Act, therefore, the legal personal representatives of a vendor of freeholds in fee, or a freehold estate *pur autre vie* (*d*), who has died since the commencement of the Act, and pending completion, have been enabled to complete the contract by conveying the legal estate to the purchaser in all cases in which the vendor had in his lifetime entered into a valid contract for sale. But it is to be observed that the power of conveyance given by the 4th section of the Act depends on the existence at the vendor's death of a contract for sale *enforceable* against his heir or devisee. It seems, therefore, that the power does not arise where the contract for sale was oral only, or put into writing but not signed by the vendor (*e*), unless this objection to the enforcement of the contract should have been removed under the doctrine of part performance or otherwise (*f*). And where a conveyance has been made in pursuance of this enactment, it appears to be a necessary part of the title to prove that the power so exercised duly arose; and for this purpose production of a contract for sale, duly put into writing and signed, may, it seems, be required (*g*). As we have seen, under the Land Transfer Act, 1897 (*h*), a deceased person's freehold estate of inheritance now passes, notwithstanding any testamentary disposition thereof, to his personal representatives, as trustees for the persons by law beneficially entitled thereto. It appears, therefore, that if a vendor of freeholds in fee die since the commencement of that Act, and pending the completion of the contract, his estate therein must devolve upon his executors or administrators in any event. If the contract should have been so far performed that the vendor was, at the

(*d*) Above, p. 177.

(*e*) Above, p. 9.

(*f*) Above, pp. 9—12.

(*g*) See 1 Key & Elph. Prec. Conv. 544, n., 4th ed.

(*h*) Stat. 60 & 61 Vict. c. 65, s. 1 (1); above, pp. 189, 190.

date of his death, an absolute trustee of the land for the purchaser, the vendor's estate appears to pass to his executors or administrators, under sect. 30 of the Conveyancing Act of 1881 (*i*); otherwise they appear to take the estate under the Land Transfer Act, 1897 (*k*).

Estate tail.

If the vendor were seised of the property sold for an estate tail, it appears that his estate therein still passes, on his death pending completion and without having barred the entail, to the heir in tail (*l*), or if there be no such heir, to the reversioner or remainderman. And the contract is not enforceable against these persons (*m*), notwithstanding that the vendor in his lifetime could have made a good title by barring the entail (*n*), and might have been decreed to perform the contract specifically (*o*). But if the vendor, being a tenant in tail only, had entered into an absolute contract for sale of the fee simple, his death without having barred the entail causes a breach of the contract to show a good title, and for this his executors are liable in damages at law. If the tenant in tail should have contracted to sell the entailed lands in exercise of the power of sale given to him by the Settled Land Act, 1882 (*p*), and died pending completion, the contract would be enforceable against all persons entitled to the lands after his death under the settlement by virtue of which he held the same (*q*). Such a contract is quite different from a contract to exercise the power of disposition annexed by law to the ownership of his estate. In the one case

Sale by tenant in tail under the Settled Land Acts.

(*i*) Above, p. 463.

(*k*) It appears, however, that the vendor's heir or devisee should still be made a party to any action for specific performance of the contract, as having an interest in disputing the contract: above, p. 462, nn. (*r*), (*s*); Rawlins, Sp. Perf. 83.

(*l*) Above, p. 194.

(*m*) Stat. 3 & 4 Will. IV. c. 74, s. 40; Sug. V. & P. 427; 2 Dart, V. & P. 1117.

(*n*) *Cattell* v. *Corrall*, 4 Y. & C. 228.

(*o*) Sug. V. & P. 205; *Bankes* v. *Small*, 36 Ch. D. 716.

(*p*) Stat. 45 & 46 Vict. c. 38, s. 58 (1) (i).

(*q*) Sect. 31 (2).

the purchase money is intended to be paid, not to the vendor, but to trustees or into Court in trust for the persons entitled under the settlement (*r*), and it is not intended to bar the entail: in the other, the vendor proposes to bar the entail and to take the purchase money for himself (*s*). It appears that an open contract to sell the fee made by a tenant in tail would be referable to the power of disposition annexed to his ownership of the estate (*t*), as the purchase money would be payable to himself. If the property sold were copyhold held for a customary estate in fee and the vendor had been admitted tenant, his estate will not pass, on his death pending completion, to his executors or administrators, either under sect. 30 of the Conveyancing Act of 1881 (*u*), or under the Land Transfer Act, 1897 (*x*), but will go to his customary heir or devisee, according as he died intestate or testate in respect thereof, pursuant to the old law formerly affecting freeholds (*y*). If the property sold were copyhold, in which the vendor had an equitable estate in fee or of which he was an unadmitted surrenderee in fee, it appears that, on his death before completion, his estate would pass to his executors or administrators if he were then a trustee thereof within the meaning of sect. 30 of the Conveyancing Act of 1881 (*z*); and if not, it would appear to pass to them under the Land Transfer Act, 1897 (*a*). The 4th section of the Conveyancing Act of 1881 (*b*) relates only to the case of the sale of the fee simple or other *freehold* interest descendible to the heirs *general*, and does not therefore apply in the case of the sale of an estate of inheritance, whether legal or equit-

Copyholds.

(*r*) Above, p. 308.
(*s*) Wms. Real Prop. 90, 98, 106, 107, 19th ed.
(*t*) See Sug. Pow. 343 *sq.*, 8th ed.; Farwell on Powers, 266, 2nd ed.
(*u*) Above, p. 183.
(*x*) Above, pp. 190, 194—196.
(*y*) Above, pp. 177, 462.
(*z*) Above, pp. 182, 183, 463.
(*a*) *Re Somerville and Turner's Contract*, 1903, W. N. 153; above, pp. 195, 196.
(*b*) Above, p. 463.

able, in any copyhold hereditaments. If the property sold were leaseholds for years, the vendor's estate therein would in any case pass, on his death before completion, to his executors or administrators at common law (*c*). Leaseholds.

As between the vendor and his own representatives after his death, the property sold, if real estate, is, as we have seen (*d*), converted into personalty as from the date of the contract for sale, provided that the contract become fully binding by the acceptance of the title. If this condition be fulfilled, the purchase money and the vendor's lien therefor belong, in case of his death before completion, to his executors or administrators as part of his personal estate (*e*): but the benefit of the vendor's right to take the rents and profits up to the proper time for completion will pass, if he die before that time, to his heir or devisee (*f*), subject to the executor's or administrator's interest therein for payment of the vendor's debts under the Land Transfer Act, 1897 (*g*). If the vendor should, prior to the contract for sale, have specifically devised the land afterwards sold, the devise—although it would, prior to the Land Transfer Act, 1897, convey the vendor's estate at law (*h*)—is in equity adeemed; so that the devisee is not entitled to the purchase money (*i*) unless a contrary intention should appear from the will (*k*). If a contract for the sale of Conversion of the land sold in the vendor's hands.

(*c*) Above, pp. 178, 180.

(*d*) Above, p. 439.

(*e*) Above, pp. 440, 461.

(*f*) *Lumsden* v. *Fraser*, 12 Sim. 263; 1 Dart, 302; *Watts* v. *Watts*, L. R. 17 Eq. 217.

(*g*) Above, pp. 190—192.

(*h*) Above, p. 462.

(*i*) *Moor* v. *Raisbeck*, 12 Sim. 123; *Farrar* v. *Winterton*, 5 Beav. 1; *Weeding* v. *Weeding*, 1 J. & H. 424, 431; *Watts* v. *Watts*, L. R. 17 Eq. 217; Sug. V. & P. 190; 1 Dart, V. & P. 302. The same law is applicable where the land has been disposed of by will in exercise of a general or special power of appointment and afterwards sold: *Re Dowsett*, 1901, 1 Ch. 398; *Beddington* v. *Baumann*, 1903, A. C. 13.

(*k*) *Drant* v. *Vause*, 1 Y. & C. C. C. 580; *Emuss* v. *Smith*, 2 De G. & S. 722; *Weeding* v. *Weeding*, 1 J. & H. 424, 431; 1 Dart, V. & P. 302, 303; and see Sugd. Law of Property, 223.

real estate become unconditionally binding by the acceptance of the vendor's title and the vendor die pending completion, and afterwards the contract fail to be performed owing to the purchaser's default in payment of the price, the land becomes in equity the property of the persons entitled on the vendor's death to his personal estate; for they became absolutely entitled to the benefit of the vendor's lien when the contract became fully binding; and they remain entitled, on failure of the contract by the purchaser's default, to take possession of their security *in specie* (*l*). But if the contract never become absolutely binding upon and specifically enforceable against both parties, as where there is a failure to show a good title on the vendor's part, or the contract is voidable *ab initio* and is avoided for fraud, misrepresentation, or any other cause (such as omission to comply with the Statute of Frauds (*m*)), there is no conversion of the property sold in the vendor's hands, and if he die, the land, which was the subject of the contract, will pass as such to the persons entitled to his lands either on his intestacy or under his will (*n*). And the like result follows where a contract for sale of lands has been rescinded or abandoned by consent of the parties in the vendor's lifetime (*o*).

Option to purchase.

When a man has entered into a valid contract giving to another an option to purchase (*p*) his real estate, the

(*l*) *Curre* v. *Bowyer*, 5 Beav. 6, n.; *Lysaght* v. *Edwards*, 2 Ch. D. 499, 506.

(*m*) Above, p. 9.

(*n*) Above, pp. 174 *sq.*; and see *Haynes* v. *Haynes*, 1 Dr. & Sm. 426; *Edwards* v. *West*, 7 Ch. D. 858, 862; 1 Jarm. Wills, 54, 5th ed.

(*o*) Sug. V. & P. 191.

(*p*) A contract giving an option to purchase any land gives an *interest* in the land to the person who has the option, and must therefore conform with the 4th section of the Statute of Frauds (above, p. 3), and with the rule against perpetuities: *London and South Western Railway* v. *Gomm*, 20 Ch. D. 562. In order that an option to purchase any land may be well exercised, the terms of the contract, grant or devise, which created the option, must in all respects be strictly pursued, and where any particular time is specified for the exercise of the option, time is of the essence of the contract or matter: *Brooke* v. *Garrod*, 2 De G. & J. 62; *Rane-*

property is converted into personalty in the hands of the vendor, his heirs and assigns, as from the time of the exercise of the option; and if the vendor die before that time, his heirs or assigns of the hereditaments in question are entitled to the rents and profits thereof until the option is exercised, after which, in the absence of any disposition to the contrary made by his will (*q*), his legal personal representatives are entitled to the purchase money, with interest from that time until payment, as part of his personal estate (*r*).

Conveyance of deceased vendor's estate by vesting order.

As we have seen (*s*), in case of the vendor's death pending completion, a conveyance of his estate must be executed to the purchaser before the purchase money can be obtained. Such a conveyance cannot always be immediately executed by the persons on whom the vendor's estate has devolved on account of their being under disability or from other causes. In certain cases of this kind the required conveyance may be effected by vesting order made under the jurisdiction conferred by the Lunacy Act, 1890 (*t*), or the Trustee Act, 1893 (*u*).

lagh v. *Melton*, 10 Jur. N. S. 1141; *Weston* v. *Collins*, 11 Jur. N. S. 190; and see *Mills* v. *Haywood*, 6 Ch. D. 196. The benefit of an option given by covenant contained in a lease to the lessee, his executors, administrators or assigns, to purchase the fee simple of the demised premises goes, after the lessee's death, to the persons becoming entitled to the lease: *Re Adams and Kensington Vestry*, 27 Ch. D. 394. As to whether such an option to purchase must conform with the rule against perpetuities, see 42 Sol. J. 628, 650 (by the present writer). As to the effect of a contract to give the first refusal of land, see *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, 1901, 2 Ch. 37.

(*q*) See above, p. 467, n. (*k*).

(*r*) *Lawes* v. *Bennett*, 1 Cox, 167; *Townley* v. *Bedwell*, 14 Ves. 590; *Weeding* v. *Weeding*, 1 J. & H. 424; *Re Adams and Kensington Vestry*, 27 Ch. D. 394, 399.

(*s*) Above, p. 462.

(*t*) Stat. 53 Vict. c. 5, s. 135, enabling the Judge in lunacy to make a vesting order when a lunatic is solely or jointly seised or possessed of, or entitled to a contingent right in any land upon trust.

(*u*) Stat. 56 & 57 Vict. c. 53, ss. 26—34. These enactments and that mentioned in the previous note have replaced the Trustee Acts, 1850 and 1852 (stats. 13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55), which

But, except where the contract is established by bringing an action for its specific performance, the Court will

replaced 11 Geo. IV. & 1 Will. IV. c. 60; 4 & 5 Will. IV. c. 23; and 1 & 2 Vict. c. 69.

By the Trustee Act, 1893, s. 26, the High Court may make a vesting order—

(i.) Where the High Court appoints or has appointed a new trustee;

(ii.) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person—

(a) is an infant, or

(b) is out of the jurisdiction of the High Court, or

(c) cannot be found;

(iii.) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land;

(iv.) Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead;

(v.) Where there is no heir or personal representative to a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of any land and is dead;

(vi.) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement.

By sect. 27, where any land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence, would, in respect thereof, become entitled to or possessed of the land or any trust, the High Court may make an order releasing the land from the contingent right, or may make an order vesting in any person the estate to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land.

By sect. 31, where judgment is given (amongst other things) for the specific performance of a contract concerning any land, the High Court may declare that any of the parties to the action are trustees of the land or any part thereof within the meaning of this Act, or may declare that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this Act, and thereupon the High Court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

By sect. 32, vesting orders have the effect of a conveyance by the proper persons. By sect. 33, the Court may, in all cases where a vesting order can be made, appoint a person to convey, and a conveyance by such person shall have the same effect as a vesting order. By sect. 34, where an order vesting copyhold land is made with the consent of the lord of the manor, the land shall vest without surrender or admittance; and where a person is appointed to convey any copy-

not make a vesting order as to a deceased vendor's estate under these Acts unless the contract had been so far executed in his lifetime that at the time of his death he was unquestionably an absolute trustee for the purchaser (*x*); as, for example, where the whole or the bulk of the purchase money had been paid and the purchaser let into possession (*y*). It may be observed that the construction so placed on these Acts is not inconsistent with the doctrine that the vendor is a trustee for the purchaser conditionally as from the date of the contract, and absolutely when the contract has become fully binding by the acceptance of the title (*z*). The Court, in exercising the jurisdiction conferred by these Acts, does not question this doctrine; it merely requires indisputable evidence of the vendor's absolute trusteeship before it will treat his representatives as trustees.

Death of vendor who sold under a power.

Where the owner of a power of appointment over lands has contracted to sell the same in exercise of the power (*a*), and dies before completion of the sale by conveyance under the power, the contract for sale is treated in equity on the same footing as a defective execution of the power, and will accordingly be specifically enforceable by the purchaser against the persons entitled to the lands in default of appointment. Thus,

hold land, he shall do all things necessary to complete the assurance thereof, and the lord of the manor shall, subject to the customs of the manor and the usual payments, admit him accordingly.

(*x*) *Re Carpenter*, Kay, 418; *Re Colling*, 32 Ch. D. 333.

(*y*) *Re Cuming*, L. R. 5 Ch. 72; *Re Pagani*, 1892, 1 Ch. 236.

(*z*) Above, pp. 439, 462, 463.

(*a*) The question whether the vendor contracted to sell in exercise of the power depends upon his intention. It is not necessary that the contract should refer to the power. Where the vendor had no estate in the land, it will be presumed that he contracted to sell in exercise of his power; but where he had an estate in the land as well as the power, it is a question of construction whether he contracted to sell in exercise of the right of alienation annexed to his estate or of the power: see *Blake* v. *Marnell*, 2 Ball & Beat. 35; Sug. Pow. 201 *sq.*, 289, 343 *sq.*, 8th ed.; Farwell on Powers, 266, 2nd ed.; above, pp. 465, 466.

if the power of appointment were exercisable by deed only, and the contract for sale were made by unsealed writing, and the vendor died before conveyance, equity would supply the defect in favour of the purchaser, and would oblige the persons entitled in default of appointment to carry out the contract (*b*). But in order that a contract to exercise a power over land may be so binding on those entitled in default of appointment, it must be valid from the beginning; and it appears that a parol contract, followed by part performance, by the purchaser, is not so enforceable against them (*c*), unless, with knowledge of the parol contract, they lie by and allow him to lay out money on the estate (*d*). Every contract for the sale of settled land made by a tenant for life or any person having the powers of a tenant for life under the Settled Land Act, 1882 (*e*), is binding on, and enures for the benefit of, the settled land, and is enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor, but so that it may be varied or rescinded by any such successor in the like case and manner, if any, as if it had been made by himself. And by the Settled Land Act, 1890 (*f*), a tenant for life may make any conveyance which is necessary or proper for giving effect to a contract entered into by a predecessor in title, and which, if made by such predecessor, would have been valid as against his successors in title. This enactment appears to be applicable, not only where the contract was made in exercise of some power conferred by the

Contracts for the sale of settled land under the Settled Land Acts.

(*Sic.*)

(*b*) *Coventry* v. *Coventry*, 1 Str. 596; *Mortlock* v. *Buller*, 10 Ves. 292, 315; *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52; Sug. Pow. 552, 563, 8th ed.

(*c*) *Blore* v. *Sutton*, 3 Mer. 237; *Morgan* v. *Milman*, 3 De G. M. & G. 24, 33.

(*d*) *Stiles* v. *Cowper*, 3 Atk. 692; *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52, 72, 73.

(*e*) Stat. 45 & 46 Vict. c. 38, ss. 31 (1), (2), 58.

(*f*) Stat. 53 & 54 Vict. c. 69, s. 6.

Settled Land Acts, but in all other cases where the contract binds the contractor's successors in estate; for example, where one seised of lands in fee has sold them, and died pending completion, having devised the lands to another for life with remainder over. But in these circumstances, if the vendor died after the commencement of the Land Transfer Act, 1897 (*g*), the purchaser could not safely take a conveyance from the tenant for life under the will, except where the real estate sold was not affected by this Act, as in the case of copyholds (*h*), for the effect of the Act is to prevent any legal estate from passing to the devisees, and in equity the devise, if made prior to the sale, would be revoked thereby (*i*).

Devolution of the burthen of the contract on the vendor's death.

If the vendor die pending completion, the proper persons to be sued by the purchaser for the specific performance of the contract are the vendor's executors or administrators, as being his general representatives in respect of his contractual liabilities and being the persons entitled to receive the purchase money; but the vendor's heir or devisee, who would have been entitled to the land if it had not been sold, was formerly and, it appears, is still a necessary party to the action, as having an interest in disputing the validity of the contract (*k*). The vendor's legal personal representatives are the proper persons to be sued for breach of the contract at law (*l*).

Death of the purchaser.

As we have seen (*m*), when a man enters into a contract, which is valid and specifically enforceable, for the

(*g*) Above, pp. 189 *sq.*, 464.
(*h*) Above, pp. 190, 196, 466.
(*i*) Above, pp. 189 *sq.*, 467.
(*k*) Above, pp. 462, nn. (*r*), (*s*), 465, n. (*k*), and the authorities there cited; Rawlins on Specific Performance, 83.
(*l*) But if the contract were under seal and bound the vendor's heirs, his heirs or devisees might be sued thereon at law: see above, p. 184; Wms. Conv. Stat. 234, 235.
(*m*) Above, pp. 439, 440.

purchase of land, the land is in equity *his* land as from the date of the contract. If therefore he die pending the completion of the contract, the benefit of his rights under the contract passes to the persons who become entitled to that particular part of his lands, which is represented by the property purchased. If this were freehold estate of inheritance, the beneficial interest therein passed formerly to his heir, if he died intestate in respect thereof, and otherwise to his specific or general devisee (*n*); and in the hands of such heir or devisee would be *real* assets for payment of his debts (*o*). Under the Land Transfer Act, 1897 (*p*), freehold estate of inheritance contracted to be purchased appears to pass, on the purchaser's death pending completion, to his executors or administrators, upon trust, subject to the payment of his funeral and testamentary expenses and debts, for his heir or devisee. If the property purchased were a legal estate of inheritance in copyholds, the purchaser's interest devolves upon his customary heir or devisee; and it does not appear that his executors or administrators take any estate therein under the Land Transfer Act, 1897: but the personal representatives take the purchaser's estate where he bought an equitable estate only in copyholds (*q*). In either case the lands would be real assets for payment of the purchaser's debts (*r*). If leaseholds were purchased, they pass of course to the purchaser's executors or administrators as part of his personal estate. The persons so becoming entitled, on the purchaser's death, to the land which he has contracted to purchase, are the proper persons to sue for

(*n*) Since the Wills Act, 1837, lands purchased after the date of a will pass under a general devise therein contained; previously they did not: Sug. V. & P. 183—189; stat. 7 Will. IV. & 1 Vict. c. 26, ss. 3. 23, 24.

(*o*) Above, pp. 183, 184, 440.

(*p*) Stat. 60 & 61 Vict. c. 65, ss. 1, 2; above, pp. 189, 190.

(*q*) *Re Somerville and Turner's Contract*, 1903, W. N. 153; above, pp. 190, 194—196.

(*r*) Above, pp. 183, 184.

the specific performance of the contract by the vendor: but the purchaser's legal personal representatives should be made parties to such an action, if brought by his heir or devisee, as they are liable to the vendor for payment of the purchase money and have an interest in disputing the contract (*s*). The proper persons to sue, after the purchaser's death, for damages at law for breach of the contract are his legal personal representatives (*t*); and any damages so recovered appear to form part of the purchaser's personal estate.

Purchaser's heir or devisee now takes subject to the vendor's lien.

Formerly, if one contracted to buy land and died pending completion, his heir or devisee, in the case of real estate, or his specific devisee in the case of leaseholds, was entitled to have the purchase money paid out of the deceased purchaser's general personal estate (*u*). But now, under the Acts amending Locke King's Act (*x*), the heir or devisee, or the specific devisee of leaseholds (*y*), must take the hereditaments so purchased charged with the vendor's lien for payment of the

(*s*) Fry, Sp. Perf. 93, 3rd ed., 87, 4th ed. And it appears that where the purchaser's personal representatives sue for specific performance of a contract to buy real estate, as being entitled thereto under the Land Transfer Act, 1897, they should still make his heir or devisee a party as being the person beneficially entitled and being interested in securing a proper inquiry into the title: Rawlins, Spec. Perf. 83.

(*t*) *Orme* v. *Broughton*, 10 Bing. 533; Sug. V. & P. 238; 2 Dart, V. & P. 1084.

(*u*) *Broome* v. *Monck*, 10 Ves. 597, 614, 620, 621; *Hood* v. *Hood*, 3 Jur. N. S. 684.

(*x*) Stat. 40 & 41 Vict. c. 34, extending the provisions of 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69, to the case of any testator or intestate dying after the 31st December, 1877, seised or possessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with any lien for unpaid purchase money, unless in the case of a *testator* he shall within the meaning of these Acts have signified a contrary intention; and providing that such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate. By stat. 30 & 31 Vict. c. 69, s. 1, a general direction that the debts of the testator shall be paid out of his personal estate is not to be deemed a declaration of such contrary intention without words expressly or impliedly referring to the debt charged on the land.

(*y*) *Re Kershaw*, 37 Ch. D. 674.

purchase money, which is, as between the heir or devisee and the persons entitled to the purchaser's personalty, to be satisfied out of the estate purchased; unless the purchaser, being a *testator* of the property bought (*z*), should have signified a contrary intention within the meaning of the Acts. But these Acts do not affect the vendor's right to obtain payment of the purchase money out of all the purchaser's assets, real or personal (*a*). It is to be observed that the Acts apparently do not apply where the lands purchased are not subject to any vendor's lien, as may be the case if the parties so agree (*b*).

Test of the property devolving as land on the purchaser's death.

The right of a deceased purchaser's heir or devisee to succeed to real estate, contracted to be purchased by but not conveyed to him in his lifetime, depends upon the like condition as determines the question of the conversion of the property into personalty in the vendor's hands; that is to say, whether the contract was specifically enforceable against the purchaser at the time of his death. If this were so, the heir or devisee is absolutely entitled to the property; and he was formerly so absolutely entitled to have the purchase money raised out of the dead man's personalty that if the contract had been specifically enforceable against the purchaser at his death, but was not performed owing to some cause subsequently occurring, the heir or devisee was entitled to have the purchase money raised and applied in the purchase for him of other lands (*c*). But this was not the case where the contract failed to be per-

(*z*) See *Re Cockcroft*, 24 Ch. D. 94, 100.

(*a*) See stat. 17 & 18 Vict. c. 113.

(*b*) See *Re Cockcroft*, ubi sup.

(*c*) *Whittaker* v. *Whittaker*, 4 Bro. C. C. 31; *Broome* v. *Monck*, 10 Ves. 597, 599, 606—608, 614; *Garnett* v. *Acton*, 28 Beav. 333; *Hudson* v. *Cook*, L. R. 13 Eq. 417; *sed qu.* whether this last case was rightly decided; the purchaser had entered into a contract which was not absolute, but voidable by the vendor in certain events.

formed owing to the vendor's want of title; for that proved that the contract was not specifically enforceable against the purchaser when he died (*d*). This doctrine of allowing the heir or devisee to have the purchase money raised and laid out in buying other lands appears to be only applicable, under the present law, where the heir or devisee does not take the estate purchased subject to the vendor's lien (*e*).

Devolution of the burthen of the contract on the purchaser's death.

The burthen of the contract on the purchaser's death before completion devolves upon his legal personal representatives, who are the proper persons to be sued by the vendor either in equity for specific performance of the contract or at law for damages for its breach (*f*); but the purchaser's heir or devisee becoming entitled to the purchased land was, and apparently still remains, a necessary party to proceedings at suit of the vendor for specific performance of the contract, as having an interest in seeing that the inquiry into title is properly conducted (*g*).

Bankruptcy of either party to the contract.

A contract for the sale of land is not discharged either by an act of bankruptcy committed or by a receiving order or an adjudication of bankruptcy made pending completion by or against either party thereto (*h*); but after a receiving order has been made against either party, the other has no remedy against the property or person of the debtor in respect of any liability of the

(*d*) *Broome* v. *Monck*, 10 Ves. 597; *Collier* v. *Jenkins*, Younge, 295.

(*e*) Above, p. 475; *Re Cockcroft*, 24 Ch. D. 94, 100, 101.

(*f*) But if the contract were under seal, and bound the purchaser's heirs, his heirs or devisees might be sued thereon at law: 2 Dart, V. & P. 1084; see above, p. 184; Wms. Conv. Stat. 234, 235.

(*g*) *Townsend* v. *Champernowne*, 9 Price, 130; above, pp. 462, nn. (*r*), (*s*), 465, n. (*k*), 473; Rawlins on Specific Performance, 83, 84.

(*h*) *Brooke* v. *Hewitt*, 3 Ves. 253, 255; Sug. V. & P. 175; Dart, V. & P. 291.

debtor which is provable in bankruptcy, and cannot commence any action or other legal proceedings to enforce such liability, unless with the leave of the Court, and on such terms as the Court may impose (*i*). And after the presentation of a bankruptcy petition against either party to the contract the Court may stay any action, execution, or other legal process then pending against him (*k*). When a receiving order has been made against either party to the contract, the other may prove under the bankruptcy proceedings in respect of the debtor's liability on any contract made by him, so far as such liability consists in the obligation to pay money or money's worth on breach of the agreement, or is capable of resulting in the payment of money or money's worth (*l*). And an order of discharge under the Bankruptcy Act, 1883 (*m*), or a composition or scheme of arrangement accepted and approved by the Court under the Bankruptcy Act, 1890 (*n*), will release the bankrupt or debtor from all liabilities provable in bankruptcy, with certain exceptions not material to be here stated. The vendor's liability on the contract at law seems to be provable in his bankruptcy, for it is reducible to the obligation to pay money damages on breach of the contract (*o*): but his liability in equity to perform the contract specifically depends on different considerations, and does not appear to be so provable (*p*). The purchaser's liability on the contract, whether at law or in equity, seems almost entirely to consist in his obligation to pay the price (*q*), and to be provable in his bankruptcy accordingly.

(*i*) Stat. 46 & 47 Vict. c. 52, ss. 9, 168.

(*k*) Sect. 10.

(*l*) Sect. 37; see *Hardy* v. *Fothergill*, 13 App. Cas. 351.

(*m*) Stat. 46 & 47 Vict. c. 52, s. 30.

(*n*) Stat. 53 & 54 Vict. c. 71, s. 3 (12); *Flint* v. *Barnard*, 22 Q. B. D. 90; *Seaton* v. *Deerhurst*, 1895, 1 Q. B. 853.

(*o*) Above, p. 30.

(*p*) See the cases cited in notes (*t*), (*y*), below; above, p. 31.

(*q*) Above, pp. 29, 30.

Bankruptcy of the vendor.

If the vendor be adjudged bankrupt pending completion, his rights under the contract vest, as part of his property, in the trustee in his bankruptcy (*r*); and his estate in the land sold also vests in the trustee, unless, it appears, the contract had been executed by payment of the whole of the purchase money before the act of bankruptcy, so that the vendor had become a bare trustee for the purchaser (*s*). But the trustee in the bankruptcy takes the vendor's estate in the land sold subject to the purchaser's equities therein under the contract (*t*); and if he cannot, or does not, disclaim the land sold under his power to disclaim onerous property (*u*), he cannot disclaim the contract for sale, where it contains no more than the usual reciprocal duties of vendor and purchaser (*x*), as an unprofitable contract (*u*); but the specific performance of the agreement may be enforced against him by the purchaser (*y*). If the vendor should have bound himself by the contract to lay out money on the property sold prior to completion, his trustee in bankruptcy might, it is thought,

(*r*) Stat. 46 & 47 Vict. c. 52, ss. 20, 44, 50 (5), 168; *Expte. Rabbidge*, 8 Ch. D. 367.

(*s*) See *S. C.*, 8 Ch. D. 371; above, p. 463. It does not appear that the vendor could be treated as holding the land sold on trust for the purchaser, so that it would not pass to his trustee in bankruptcy, merely by reason of the acceptance of the title: see cases cited in note (*y*), below.

(*t*) *Expte. Holthausen*, L. R. 9 Ch. 722, 726; *Expte. Rabbidge*, 8 Ch. D. 367, 370, 371; see above, pp. 438 *sq.*, 461.

(*u*) Stat. 46 & 47 Vict. c. 52, s. 55, amended by 53 & 54 Vict. c. 71, s. 13, empowering the trustee in bankruptcy within twelve months after the first appointment of a trustee, or where the property shall not have come to the knowledge of the trustee within one month after such appointment, within twelve months after he first became aware thereof, or in either case within such extended period as may be allowed by the Court, to disclaim any part of the property of the bankrupt which consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable or not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money.

(*x*) Above, pp. 27, 29.

(*y*) *Pearce* v. *Bastable's Trustee*, 1901, 2 Ch. 122; *Re Bastable*, 1901, 2 K. B. 518.

be at liberty to disclaim the contract if it would be unprofitable, and so free himself from the obligation of incurring the expense: but even this disclaimer would not affect the purchaser's equitable interest in the land (*z*). And if the trustee in bankruptcy were entitled to disclaim, and should disclaim, the property sold as being onerous, as he might in the case of leaseholds, the purchaser's equitable interest therein would be equally unaffected (*z*), and the purchaser might apply to the Court for an order vesting the estate in him (*a*).

Act of bankruptcy by the vendor.

In consequence of the doctrine of the relation back of the title of a trustee in bankruptcy to the act of bankruptcy (*b*), if a purchaser of land have notice of an act of bankruptcy committed by the vendor, he cannot safely proceed with the contract (unless with the concurrence of the vendor's trustee in bankruptcy) during the three months for which the act of bankruptcy remains available as a ground of bankruptcy proceedings (*c*). For if the purchaser were to accept a conveyance from the vendor and to pay him the purchase money, then, if the vendor should afterwards be adjudged bankrupt in respect of that act of bankruptcy, the conveyance to the purchaser would be rendered ineffectual and the purchaser would be liable to pay the money over again to the trustee in bankruptcy (*d*). For these reasons, a vendor who has committed an act of bankruptcy is not entitled to enforce the specific performance of the contract (*e*). And where time is of the essence of the contract, as upon the sale of a public-

(*z*) *Re Bastable*, 1901, 2 K. B. 518, 529; stat. 46 & 47 Vict. c. 52, s. 55 (2).

(*a*) Stat. 46 & 47 Vict. c. 52, s. 55 (6).

(*b*) Stat. 46 & 47 Vict. c. 52, ss. 4, 43, amended by 53 & 54 Vict. c. 71, ss. 1, 20.

(*c*) See stat. 46 & 47 Vict. c. 52, ss. 6 (1) (c), 43.

(*d*) *Expte. Rabbidge*, 8 Ch. D. 367; *Powell* v. *Marshall*, 1899, 1 Q. B. 710, 712, 713.

(*e*) *Lowes* v. *Lush*, 14 Ves. 547.

house as a going concern (*f*), if the purchaser have notice of an act of bankruptcy by the vendor, which will be available at the time fixed for completion, he is entitled at law to treat the contract as broken, and to recover his deposit accordingly (*g*). Where time is not of the essence of the contract, as is usually the case on sales of land (*h*), it seems open to the purchaser, on receiving notice of an act of bankruptcy by the vendor, at once to object to the title, on the ground that after the act of bankruptcy the vendor can only convey an estate, which is no longer absolute but defeasible on adjudication, and cannot give a good receipt for the purchase money (*i*). And it is submitted that if the purchaser make this objection and at the time fixed for completion the vendor still remain unable to make a valid conveyance, either alone or with the concurrence of the trustee under an adjudication of bankruptcy against him, the purchaser, not being in default with regard to the performance of his part of the contract, will be entitled to treat the contract as broken. But if at the time fixed for completion the act of bankruptcy have ceased to be available or the vendor have been adjudged bankrupt, it appears that the vendor or his trustee in bankruptcy, as the case may be, will be entitled to enforce the contract either specifically in equity or at law. And if the purchaser do not repudiate the contract in the manner indicated above, it appears that the vendor or his trustee in bankruptcy will be entitled to enforce the same, specifically or otherwise, after the act of bankruptcy has ceased to be available or an adjudication has taken place, although the day fixed for completion is gone by (*k*). The vendor's trustee in

(*f*) Above, p. 425.

(*g*) *Powell* v. *Marshall*, 1899, 1 Q. B. 710.

(*h*) Above, pp. 47—49.

(*i*) See above, pp. 134, 135; *Lowes* v. *Lush*, 14 Ves. 547, 549; *Goodwin* v. *Lightbody*, Dan. 153; *Hipwell* v. *Knight*, 1 Y. & C. 401, 419; Sug. V. & P. 176.

(*k*) See *Lowes* v. *Lush*, 14 Ves.

bankruptcy must, however, obtain the permission of the committee of inspection before bringing any action upon the contract against the purchaser (*l*). If the purchaser of his own accord choose to wait after the time fixed for completion, either until the vendor's bankruptcy or until the particular act of bankruptcy has ceased to be available (*m*), he will be able to complete the contract safely, paying the purchase money to and taking a conveyance from the trustee in the bankruptcy in the former case, and in the latter the vendor himself. Under the Bankruptcy Act, 1883, if the purchaser should have no notice of an act of bankruptcy committed by the vendor, the conveyance of the property by and the payment of the purchase money to the vendor will not be invalidated in the event of the vendor being afterwards adjudged bankrupt upon that act of bankruptcy, provided that the conveyance and payment take place before the date of any receiving order made against the vendor (*n*). But if in such a case the completion of the contract should not take place until after that date, the purchaser is not protected; and it appears that both the conveyance to him and the payment by him would be rendered ineffectual on a consequent adjudication of bankruptcy against the vendor (*o*).

Insolvent vendor when discharged from liability on the contract.

If before completion of the contract the vendor be adjudged bankrupt and obtain an order of discharge, or a composition or scheme of arrangement with his creditors be accepted and approved by the Court, it appears that he will be released from his liability on the contract at law (*p*). But, as we have seen (*q*), the

547, 549; Dart, V. & P. 568, 1114; Rawlins on Specific Performance, 87; above, pp. 47—49, 134, 135.

(*l*) Stat. 46 & 47 Vict. c. 52, s. 57 (2).

(*m*) 1 Dart, V. & P. 568.

(*n*) Stat. 46 & 47 Vict. c. 52, s. 49.

(*o*) *Expte. Rabbidge*, 8 Ch. D. 367, decided on the Bankruptcy Act, 1869; and see *Powell* v. *Marshall*, 1899, 1 Q. B. 710, 713, 714.

(*p*) Above, p. 478.

(*q*) Above, p. 479.

vendor's trustee in bankruptcy takes his legal estate in the land sold subject to the purchaser's equities therein; and if this estate were reconveyed to the vendor on his obtaining his discharge, he would take it subject to the same equities. Besides this, the vendor's correlative equitable liability to specific performance of the contract does not appear to be provable in bankruptcy (*r*); so that a vendor making a composition or scheme of arrangement with his creditors under the Bankruptcy Act, 1890, without parting with his estate in the land sold, does not appear to be discharged from his liability to perform the contract specifically at the purchaser's suit (*s*).

Vendor an undischarged bankrupt at the time of the contract.

Where the vendor is an undischarged bankrupt at the time when the contract of sale was made, he cannot give a good title to or convey the land sold, if it were vested in him before his bankruptcy (*t*), or being freehold or other real estate had been acquired by or devolved upon him since the commencement of the bankruptcy (*u*). If, however, the property sold be held for a term of years, and were acquired by or devolved upon the vendor since the commencement of the bankruptcy, he can make a valid disposition thereof to anyone dealing with him in good faith and for value, either with or without notice of the bankruptcy, before the trustee intervenes, and will therefore be entitled to enforce the contract against the purchaser in proceedings either for specific performance or damages (*x*). If a bankrupt's assets be more than sufficient to satisfy his liabilities, he can make a valid

(*r*) Above, p. 478.

(*s*) See *Levy* v. *Stogdon*, 1898, 1 Ch. 478, 1899, 1 Ch. 5, where, however, the purchaser was barred by his delay from enforcing the specific performance of the contract, but was held to be entitled to a lien for the amount of his deposit.

(*t*) Above, p. 479, nn. (*r*), (*s*).

(*u*) Stat. 46 & 47 Vict. c. 52, s. 44; *Re New Land, &c. Assn. and Gray*, 1892, 2 Ch. 138; *Bird* v. *Philpott*, 1900, 1 Ch. 822.

(*x*) *Re Clayton and Barclay's Contract*, 1895, 2 Ch. 212.

disposition of his equitable interest in the surplus assets or any particular portion thereof, subject to the rights of the trustee and of his creditors (*y*).

Bankruptcy of the purchaser.

If the purchaser be adjudged bankrupt pending completion, his rights under the contract vest in his trustee in bankruptcy (*z*), who will be entitled to enforce the same against the vendor by action brought with the permission of the committee of inspection (*a*) either for damages at law or for specific performance in equity (*b*). The trustee in bankruptcy of the purchaser is, however, at liberty to disclaim the contract as unprofitable (*c*), and so long as it remains open to him to exercise his option of disclaiming the contract (*d*), the vendor cannot, without his consent, maintain an action against him for specific performance of the contract (*e*). If the purchaser's trustee in bankruptcy disclaim the contract, this will operate to determine the liabilities of the bankrupt in respect thereof (*f*); the vendor will be entitled to retain the deposit, if any (*g*), and he may prove for any injury sustained by him in consequence of the disclaimer as a debt under the bankruptcy (*h*).

Act of bankruptcy by the purchaser.

If the vendor have notice of an act of bankruptcy committed by the purchaser, he cannot safely proceed with the contract so long as the act of bankruptcy remains available; for any money subsequently paid to him by the purchaser might be recovered back by the

(*y*) *Bird* v. *Philpott*, 1900, 1 Ch. 822.

(*z*) Above, p. 479, n. (*r*).

(*a*) Above, p. 482, n. (*l*).

(*b*) 2 Dart, V. & P. 1114, 1126; Rawlins on Specific Performance, 87, 88.

(*c*) Above, p. 479, n. (*u*); *Expte. Barrell*, L. R. 10 Ch. 512.

(*d*) See stat. 46 & 47 Vict. c. 52, s. 55.

(*e*) *Holloway* v. *York*, 25 W. R. 627.

(*f*) Stat. 46 & 47 Vict. c. 52, s. 55 (2).

(*g*) *Expte. Barrell*, L. R. 10 Ch. 512; *Collins* v. *Stimson*, 11 Q. B. D. 142.

(*h*) Stat. 46 & 47 Vict. c. 52, s. 55 (7).

trustee under a consequent adjudication of bankruptcy against the purchaser (*i*). For this reason, a purchaser who has committed an act of bankruptcy remaining available against him cannot enforce the specific performance of the contract by the vendor (*k*). And it appears that if time be of the essence of the contract, and on the day fixed for completion the purchaser's act of bankruptcy still remain available against him, the vendor will be entitled to treat the contract as broken and to claim the deposit as forfeited (*l*). And if time be not of the essence of the contract, it seems that the vendor receiving notice of an act of bankruptcy by the purchaser may at once take the objection that the purchaser is not and will not at the time fixed for completion be capable of making a valid payment of the purchase money, and may repudiate the contract on this ground (*m*). But, as in the case of an act of bankruptcy by the vendor, when an act of bankruptcy by the purchaser has not been followed by any bankruptcy proceedings, and has ceased to be available against him, it is thought that he will be entitled to enforce the contract specifically or otherwise, unless in the meantime the vendor has become entitled to repudiate the contract, and, in the case of a sale where time is not of the essence of the contract, has repudiated the same (*n*). And in such case the vendor may safely complete the contract with the purchaser (*o*). Where the vendor has no notice of an act of bankruptcy committed by the purchaser, and the contract is executed by payment of the purchase money before the date of any receiving order against the purchaser, the transaction is expressly protected, and the trustee under an adjudication

(*i*) Above, pp. 479, n. (*r*), 480 n. (*b*); see next note, and *Re Pollitt*, 1893, 1 Q. B. 175, 455.

(*k*) *Franklin* v. *Brownlow*, 14 Ves. 550.

(*l*) See above, p. 481; *Collins* v. *Stimson*, 11 Q. B. D. 142.

(*m*) See above, p. 481; *Collins* v. *Stimson*, supra.

(*n*) See above, pp. 481, 482.

(*o*) See above, p. 482.

founded on that act of bankruptcy cannot recover the money back (*p*). And even if in such case the contract be completed after that date, and the vendor, without notice of the act of bankruptcy, receive from the purchaser any money or negotiable securities in payment of the price, he will obtain a perfectly valid title thereto under the general law (*q*).

Adjudication of bankruptcy against the purchaser.

If the purchaser be adjudged bankrupt pending completion, the vendor ought to make application in writing to the trustee in the bankruptcy requiring him to decide whether he will disclaim the contract or not; for if the trustee do not disclaim the contract within twenty-eight days after the receipt of such an application or within such extended period as may be allowed by the Court, he will no longer be entitled to disclaim the contract *but shall be deemed to have adopted it* (*r*). These last words, as to the adoption of the contract, were added to the bankruptcy law by the Bankruptcy Act, 1883 (*s*), and they have not yet received any judicial interpretation. Apparently, their effect is to impose on the trustee, being so deemed to adopt the contract, the liability to fulfil it with the bankrupt's assets, but not to make the trustee otherwise personally liable on the contract (*t*). If so, it would seem that the purchaser's trustee in bankruptcy, on being so deemed to adopt the contract, would be liable to be sued on the contract by the vendor either for specific performance or for damages (*u*). If however the vendor make no application requiring the trustee to elect as to disclaimer

(*p*) See above, p. 482, n. (*n*).

(*q*) See Wms. Pers. Prop. 519, 520, 15th ed.

(*r*) Stat. 46 & 47 Vict. c. 52, s. 55 (4).

(*s*) Apparently in consequence of the decision in *Re Sneezum*, 3 Ch. D. 463.

(*t*) See the arguments put forward in the Court of Appeal and the judgment of James, L. J., in the last-mentioned case: Williams's Bankruptcy Practice, 261, 262, 7th ed.

(*u*) See above, p. 484.

of the contract, and the trustee allow the time otherwise limited to him for disclaiming onerous property (*x*) to elapse without disclaiming the contract, it is not provided that the trustee shall be deemed to have adopted the contract; and in such case it does not appear that the trustee comes under any liability to perform it, or that the vendor can maintain any action thereon, either for specific performance or damages, against the trustee (*y*). But by the Bankruptcy Act, 1883 (*z*), the Court may, on the application of any person who is, as against the trustee, entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy. If the purchaser's trustee in bankruptcy do not disclaim the contract, the question arises whether the vendor can safely complete the contract with the trustee electing to adopt it. The Bankruptcy Act, 1883 (*a*), gives no express power to the trustee to perform the bankrupt's contracts generally. But the trustee is expressly empowered, with the permission of the committee of inspection, to bring any action or other legal proceeding relating to the property of the bankrupt (*b*), which includes the benefit of a contract made by the bankrupt (*c*); and by the former bankruptcy law the trustee was entitled to perform a contract entered into by the bankrupt, if he thought it would be beneficial to the creditors (*d*). It seems therefore that, as under the

(*x*) Above, p. 479, n. (*u*).

(*y*) See *Re Sneezum*, 3 Ch. D. 463; *Holloway* v. *York*, 25 W. R. 627.

(*z*) Stat. 46 & 47 Vict. c. 52, s. 55 (5).

(*a*) Stat. 46 & 47 Vict. c. 52; see sects. 56, 57; *Re Sneezum*, 3 Ch. D. 463, 473.

(*b*) Sect. 57 (2).

(*c*) Sect. 168.

(*d*) *Re Sneezum*, 3 Ch. D. 463, 472, 474.

present Bankruptcy Act the purchaser's trustee may, with the permission of the committee of inspection, sue the vendor for specific performance of the contract on the usual terms of paying the price, so he may well secure the same benefit on the same terms without litigation where the vendor is willing to carry out the contract (*e*); but it is thought that the trustee ought to obtain the permission of the committee of inspection before so performing the contract, and that the vendor cannot safely complete the contract unless this be done (*f*).

Insolvent purchaser when discharged from liability on the contract.

If before completion of the contract the purchaser should be adjudged bankrupt and obtain an order of discharge or should make a composition or a scheme of arrangement with his creditors approved under the Bankruptcy Act, 1890, it appears that he would be released from all liability under the contract, even though the trustee had not disclaimed the contract and the vendor had not proved in respect of the purchaser's liability (*g*).

Purchaser an undischarged bankrupt at the time of the contract.

If the purchaser were an undischarged bankrupt at the time when the contract of sale was made, and the vendor complete the contract and receive, in ignorance of that fact, any money or negotiable securities in payment of the price, the same cannot, of course, be recovered from him, whether the trustee in bankruptcy were entitled thereto or not (*h*). If, however, the vendor receive notice, before completion, of the purchaser's bankruptcy, it does not appear that he would obtain a good title to any money subsequently paid to him

(*e*) See the principle applied in *Stagg* v. *Medway Navigation Co.*, 1903, 1 Ch. 169.

(*f*) See *Re Vavasour*, 1900, 2 Q. B. 309.

(*g*) See above, p. 473.

(*h*) See Wms. Pers. Prop. 519, 520, 15th ed.; *Collins* v. *Stimson*, 11 Q. B. D. 142.

by the bankrupt in pursuance of the contract, unless the money had been acquired by the purchaser since the commencement of the bankruptcy, and the trustee had not intervened to claim it (*i*). The purchaser, it seems, would be obliged to prove that this was the case, and, if he failed to discharge this obligation satisfactorily, the vendor could not safely complete the contract without the concurrence of the trustee (*k*).

Land taken in execution pending completion.

The vendor may suffer the involuntary alienation of the land sold pending completion, not only in the event of his bankruptcy, but also if the land be taken in execution of a judgment against him (*l*). If this be done, either under a writ of *elegit* or by virtue of an order for the appointment of a receiver (*m*), and the writ or order be duly registered under the Land Charges Acts, 1888 and 1900 (*n*), the judgment creditor will acquire an indefeasible estate by *elegit* in the land, entitling him to hold the same until his debt be satisfied out of the rents and profits (*o*): and this will be a legal estate in the land sold, where the vendor's interest therein was legal (*o*). The judgment creditor further acquires a charge on the land so taken in execution for the amount of the judgment debt and interest (*p*), and may obtain an order for the sale of the debtor's interest in the land (*q*). And these rights of the creditor are not now affected or liable to be

(*i*) See Pollock, B., *Collins* v. *Stimson*, 11 Q. B. D. 142, 144, as to the money, which in that case was the property of the trustee, being earmarked: *Expte. Dewhurst*, L. R. 7 Ch. 185, where note that the money had been acquired by the bankrupt after the bankruptcy.

(*k*) See above, p. 484.

(*l*) See Wms. Real Prop. 261 *sq.*, 19th ed.

(*m*) See ibid. 262 *sq.*, 284, 285.

(*n*) Stats. 51 & 52 Vict. c. 51, ss. 4—6; 63 & 64 Vict. c. 26, s. 2 (1); see Wms. Real Prop. 267, 269, 19th ed.

(*o*) See Wms. Real Prop. 266, n. (*f*), 268.

(*p*) Stat. 1 & 2 Vict. c. 110, s. 13; see Wms. Real Prop. 264, 269, 19th ed.

(*q*) Stat. 27 & 28 Vict. c. 112, s. 4, amended by 63 & 64 Vict. c. 26, s. 5; see Wms. Real Prop. 268, 269, 19th ed.

diminished in case the purchaser had no notice of the judgment (*r*). The judgment creditor, however, takes the estate and interest so acquired by him in the land sold subject to the purchaser's equities therein under the contract (*s*). If the whole or any part of the purchase money should have been paid to the vendor prior to the registration of the writ or order of execution (before which time the judgment cannot now operate as a charge on the land or on any unpaid purchase money therefor (*t*)), the purchaser has priority in respect of the amount so paid over the creditors' interest in the land (*s*). If, however, the whole of the purchase money have not been paid before the registration of the writ or order, the judgment creditor becomes entitled to receive the amount remaining unpaid, or so much thereof as will satisfy the judgment debt; and the purchaser is bound and must take care to pay this amount to the creditor and not to the vendor (*u*). Any writ or order of execution and any delivery in execution of the land sold pending completion is void as against the purchaser unless the writ or order be duly registered in the Office of Land Registry under the Land Charges Act, 1888 (*x*); and the judgment does not operate as a charge on the land or any interest therein, or on the unpaid purchase money therefor, unless or until such registration takes place (*y*). But, as we shall see here-

(*r*) By the Judgments Act, 1839, no judgment, as against purchasers and mortgagees without notice thereof, should bind any hereditaments more extensively than a duly docketted judgment would have bound such purchaser or mortgagee before the Judgments Act, 1838; but this enactment was repealed by the Land Charges Act, 1900: see stats. 2 & 3 Vict. c. 11, s. 5; 63 & 64 Vict. c. 26, s. 5; Wms. Real Prop. 264—269, 506, 507, 19th ed.

(*s*) Sug. V. & P. 517, 518, 527; *Whitworth* v. *Gaugain*, 1 Ph. 728; *Lodge* v. *Lyseley*, 4 Sim. 70.

(*t*) Stat. 63 & 64 Vict. c. 26, s. 2 (1); Wms. Real Prop. 267, 269, 19th ed.

(*u*) Sug. V. & P. 518, 527; *Forth* v. *Norfolk*, 4 Madd. 503, 505; *Re Pope*, 17 Q. B. D. 743.

(*x*) Stat. 51 & 52 Vict. c. 51, ss. 4—6.

(*y*) Stat. 63 & 64 Vict. c. 26, s. 2 (1). These provisions apply to writs or orders affecting any hereditaments of any tenure; and

after (*z*), it is thought that, if the purchaser have notice that the land sold has been actually delivered in execution under an unregistered writ or order, he cannot safely disregard the fact; for the execution is valid as against the judgment debtor, and confers upon the judgment creditor an estate by *elegit* voidable, in default of registration, as against purchasers only, and it may be held that such delivery in execution is valid in equity as against a purchaser with notice thereof. Where the land sold is seized pending completion under process of execution which is valid, either at law or in equity, as against the purchaser, the judgment creditor must concur in the conveyance in order to convey his interest in the land sold, and receive and give a discharge for so much of the purchase money as is payable to him. The delivery in execution of any land, whether by writ of *elegit* or order appointing a receiver, is not an act of bankruptcy, so that in such cases the sale may be safely completed with the judgment creditor's concurrence (*a*). The subject of executions issued against the land sold pending completion is further discussed below, under the head of Searches (*b*).

Lunacy.

If either vendor or purchaser, having been sane when the contract was made, become of unsound mind before

appear therefore to apply to writs of *fi. fa.* when used for seizing leaseholds, as well as writs of *elegit*: stats. 51 & 52 Vict. c. 51, s. 4; 63 & 64 Vict. c. 26, s. 6 (3); see Wms. Real Prop. 506, 507.

(*z*) Below, Chap. XII. Sect. 2.

(*a*) See stats. 46 & 47 Vict. c. 52, s. 4; 53 & 54 Vict. c. 71, s. 1. A debtor commits an act of bankruptcy if (amongst other things) execution against him has been levied by seizure of his goods under process in an action in any Court or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days. In this context "goods" includes all chattels personal, but not apparently chattels real: see stat. 46 & 47 Vict. c. 52, ss. 45, 168. If execution be levied on a debtor's leaseholds by writ of *fi. fa.*, and the sheriff hold them for twenty-one days, it is a question whether an act of bankruptcy is committed; and if so, a purchaser of the land could not safely complete his contract, even with the judgment creditor's concurrence: see above, p. 480.

(*b*) Chap. XII. Sect. 2.

its completion, that does not avoid the contract, and an order for its specific performance may nevertheless be obtained (*c*). As, however, a person of unsound mind can make no valid conveyance or payment to another, who has notice of his mental condition (*d*), he cannot himself well perform the acts necessary to completion. But the effectual completion of the contract may be obtained in certain cases by means of an order under the Lunacy Act, 1890 (*e*). By this Act, the Judge in lunacy may by order authorise the committee of a lunatic to perform any contract relating to the property of the lunatic entered into before his lunacy (*f*); and in the case of persons of unsound mind, not being lunatics so found by inquisition, to whom the powers of management and administration given by the Act apply (*g*), such of the powers of the Act as are made exercisable by the committee of the estate shall be exercised by such person as the Judge shall direct (*h*). And the committee of the estate, or such person as the Judge approves,

(*c*) *Owen* v. *Davies*, 1 Ves. sen. 82; *Hall* v. *Warren*, 9 Ves. 605.

(*d*) Wms. Real Prop. 291, 292, 19th ed.; Wms. Pers. Prop. 94, 153, 15th ed.

(*e*) Stat. 53 Vict. c. 5, s. 120 (i).

(*f*) Sect. 120 (i).

(*g*) By sect. 116 (1), these powers apply—

(a) To lunatics so found by inquisition;

(b) To lunatics not so found by inquisition for the protection or administration of whose property any order has been made before the commencement of the Act;

(c) To every person lawfully detained as a lunatic though not so found by inquisition;

(d) To every person not so detained and not found a lunatic by inquisition, with regard to whom it is proved to the satisfaction of the Judge in lunacy that such person is through mental infirmity arising from disease or age incapable of managing his affairs;

(e) To every person as to whom it is proved to the satisfaction of the Judge in lunacy that he is of unsound mind and incapable of managing his affairs, and that his property does not exceed 2,000*l.* in value, or that the annual income thereof does not exceed 100*l.*;

(f) To every person as to whom the Judge is satisfied that he is or has been a criminal lunatic, and continues to be insane and in confinement.

(*h*) Sect. 116 (2).

shall in the name and on behalf of the lunatic execute and do all such assurances and things for giving effect to any order under this Act as the Judge directs, and every such assurance and thing shall be valid and effectual, and shall take effect accordingly, subject only to any prior charge to which the property affected thereby at the date of the order is subject (*i*). If the vendor become of unsound mind after the contract has been so far executed that he is a trustee for the purchaser within the meaning of the statutes authorising vesting orders to be made as to the estates of trustees (*k*), an order vesting the vendor's estate in the purchaser may be obtained under the Lunacy Act, 1890 (*l*).

Marriage of either party to the contract.

If either party to the contract be a single woman, and marry pending completion, she is not, under the present law (*m*), disabled from enforcing or completing the contract by herself alone. If she should have made no disposition of her interest in the contract by way of settlement, she will on marriage become entitled to the same as her separate property (*n*) and will be enabled to sue alone in respect thereof as if she were a *feme sole* (*o*). And she will be liable to be sued thereon without her husband being joined (*p*); although he will be liable on the contract to the extent of all property belonging to her which he shall have acquired or become entitled to from or through her, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him at law in respect of her ante-nuptial debts, contracts or

(*i*) Sect. 124.

(*k*) Above, pp. 469—471.

(*l*) Stat. 53 Vict. c. 5, s. 135; see *Re Cuming*, L. R. 5 Ch. 72; *Re Pagani*, 1892, 1 Ch. 236.

(*m*) As to the effect of marriage on a woman's legal capacity at common law, see Wms. Real Prop. 299 *sq.*, 19th ed.; Wms. Pers. Prop. 467, 15th ed.

(*n*) Stat. 45 & 46 Vict. c. 75, ss. 1 (1), 2, 24.

(*o*) Sects. 1 (2), 12, 24.

(*p*) Sect. 13; and see sect. 19; *Jay* v. *Robinson*, 25 Q. B. D. 467; *Robinson* v. *Lynes*, 1894, 2 Q. B. 577.

wrongs (*q*), and he may be sued on the contract either alone or jointly with her accordingly (*r*). If she be the vendor, her estate in the land sold will become her separate property on marriage, unless otherwise disposed of by ante-nuptial settlement, and she will be able to convey the same to the purchaser without her husband's concurrence (*s*). In consequence of the inconvenient doctrine that the legal estate in land vested in a married woman as trustee does not become and cannot be conveyed as her separate property (*t*), it seems necessary to point out that when a vendor of land, being the beneficial owner thereof, is or pending completion becomes a married woman, the purchaser cannot require the concurrence of her husband in the conveyance on the ground that she became an absolute trustee for the purchaser at the time when the title was accepted (*u*). For in the first place, when a married woman is disposing of her separate property for her own use, she is not a trustee thereof within the meaning of this doctrine at any time prior to the execution of the contract by payment of the purchase money (*x*). And secondly, even admitting that she were an absolute trustee for the purchaser on acceptance of the title, she would, on payment of the price, become a *bare* trustee for him (*y*), and so might well make a conveyance to him on receipt of the purchase money by virtue of the power of conveyance given to married women, who are bare trustees, by the Trustee Act, 1893 (*z*). The marriage of a man does not, of course, affect his legal capacity. But on the marriage of either party to the contract, whether man or woman,

(*q*) Sect. 14.

(*r*) Sect. 15; see *Beck* v. *Pierce*, 23 Q. B. D. 316.

(*s*) Sects. 1 (1), 2; *Re Drummond & Davie's Contract*, 1891, 1 Ch. 524.

(*t*) *Re Harkness & Allsopp's Contract*, 1896, 2 Ch. 358.

(*u*) Above, p. 462.

(*x*) See *Re Brooke & Fremlin's Contract*, 1898, 1 Ch. 647; above, pp. 439, 440.

(*y*) Above, p. 463.

(*z*) Stat. 56 & 57 Vict. c. 53, s. 16, replacing 37 & 38 Vict. c. 78, s. 6; see *Re Hougate and Osborn's Contract*, 1902, 1 Ch. 451.

the other party should inquire whether any settlement or agreement for a settlement has been made affecting the property sold or his or her interest in the contract (*a*); as if any such disposition should have been made, the contract can no longer be safely or properly completed with the lately married party alone, but the concurrence of the persons to whom his or her interest has been assigned must be obtained (*b*).

Conviction of treason or felony.

If, pending completion, either party to the contract have judgment of death or penal servitude pronounced or recorded against him in England, Wales or Ireland, upon any charge of treason or felony, he cannot, so long as he remains a convict, bring any action on the contract either at law or in equity, or alienate any property (*c*); but all his property, including his interest in the contract or in the land sold, vests in the person appointed to be his administrator, who may sue or be sued on the contract, and has such powers of dealing with the convict's property as will enable him to complete the contract (*d*). Outlawry, which remains theoretically possible in criminal proceedings, would, if incurred by a party to the contract pending completion, involve his incapacity to enforce the contract and would raise obstacles to the completion in the forfeiture to the Crown of the profits of his real estate and of his goods and chattels (*e*). If, pending completion, either party to the contract become an alien enemy (*f*), he cannot, whilst he remains so, enforce the contract (*g*).

Outlawry.

Party becoming an alien enemy.

Assignment

We will now consider the effect of the assignment by

(*a*) 1 Dart, V. & P. 373.

(*b*) See above, pp. 107, 108.

(*c*) Stat. 33 & 34 Vict. c. 23, ss. 6—8; and see sect. 30.

(*d*) Sects. 9—14; *Carr* v. *Anderson*, 1903, 2 Ch. 279.

(*e*) See Wms. Real Prop. 48, 113, 293, 19th ed.; Wms. Pers. Prop. 94, 148, 154, 15th ed.

(*f*) See *Janson* v. *Driefontein, &c.*, 1902, A. C. 484, 505, 506.

(*g*) Wms. Pers. Prop. 154, 15th ed.

by a party to the contract.

Assignment by the vendor of the land sold.

either party to the contract of the land sold or of his beneficial interest in the contract. With regard to the assignment by the vendor of the land sold, this land being in equity the property of the purchaser as from the date of the contract for sale, the vendor is not entitled to make any disposition thereof pending the completion of the contract to any other person or otherwise in derogation or to the prejudice of the purchaser's rights under the contract (*h*); any such disposition by the vendor of the land sold constitutes a breach of the contract, for which the purchaser may at once sue him at law, without making any offer to complete the contract or other formality (*i*), and the vendor may, as we have seen (*h*), be restrained by injunction from so parting with his estate in the land. If, however, the vendor do make any such alienation of the land sold, either for a legal estate to a volunteer, with or without notice of the contract for sale, or to a purchaser with notice of the contract, or for an equitable estate only to any person, the alienee takes subject to the purchaser's equities under the contract, may be joined as a party to an action for its specific performance, and may be ordered to convey his interest in the land to the purchaser in order to complete the sale (*k*). But if, upon such an alienation by the vendor, the alienee acquire a legal estate in the land sold for valuable consideration actually paid or executed in good faith without notice of the contract for the sale, he is entitled to hold this estate free from all equities of the purchaser, who has no remedy but to sue the vendor for compensation for his loss (*l*). And the alienee, taking

To purchaser for value without notice.

(*h*) Above, pp. 438 *sq.*, 452.

(*i*) *Main's case*, 5 Rep. 20b; *Lovelock* v. *Franklyn*, 8 Q. B. 371; *Synge* v. *Synge*, 1894, 1 Q. B. 466, 471.

(*k*) Above, p. 461, n. (*q*); Fry, Sp. Perf. 88, 89, 105, 3rd ed., 82, 98, 99, 4th ed.

(*l*) See *Mansell* v. *Mansell*, 2 P. W. 678, 681; *Willoughby* v. *Willoughby*, 1 T. R. 763, 771—773; *Clemow* v. *Geach*, L. R. 6 Ch. 147; *Pilcher* v. *Rawlins*, L. R. 7 Ch. 259; *Cave* v. *Cave*, 15 Ch. D. 639; *Joseph* v. *Lyons*, 15 Q. B. D.

in good faith and for the like valuable consideration is entitled to the same priority over the purchaser, not only where he has acquired the legal estate, but also where he has, before receiving notice of the contract for sale, acquired the best right to call for the legal estate. For instance, if A. were seised of lands in fee on trust for B., and B. contracted to sell the lands to C., and, pending completion of that contract and without notice thereof, the same lands were sold by B. to D., and the sale to D. were completed by payment of the purchase money, and the execution by A., at B.'s request, of an express declaration of trust in D.'s favour, it appears that C. would have no better equity than D. to insist on possession of the land (*m*). But it is to be observed that the protection obtained against the purchaser's prior equity by a subsequent alienee acquiring in good faith, for value and without notice, the legal estate or the best right to call for it, does not extend beyond the interest actually acquired for valuable consideration paid or executed before any notice of such equity has been received. If the vendor, pending completion, dispose of the land sold to a stranger for any valuable consideration which is wholly or in part executory, the alienee, though he has obtained the legal estate in good faith and without notice of the sale, cannot, if he afterwards receive notice thereof, safely perform for the vendor's use any part of the consideration then remaining unexecuted. Thus, if the vendor, pending completion of the original sale, re-sell the land and convey the legal estate therein to another without receiving payment of the whole price, the second purchaser is protected against the first pur-

280; *Hallas* v. *Robinson*, ib. 288; *Synge* v. *Synge*, 1894, 1 Q. B. 466, 471.

(*m*) See *Wilkes* v. *Bodington*, 2 Vern. 599; *Willoughby* v. *Willoughby*, 1 T. R. 763, 767—772; *Stanhope* v. *Verney*, 2 Eden, 81; *Wilmot* v. *Pike*, 5 Hare, 14, 21—23.

chaser's prior equity as regards so much of his purchase money as he has paid before receiving notice of the first sale, and is entitled to hold his legal estate as security for the amount so paid. But after he has received such notice he cannot safely pay the rest of his purchase money; for he will not be entitled to set up *his* contract of sale as specifically enforceable against the first purchaser, and, as between himself and the vendor, that contract will be rescinded and he will be discharged from all further performance of his obligations thereunder (*n*). If the vendor, pending completion of the contract, convey an equitable estate in the land sold for valuable consideration to some third person, the alienee cannot, after receiving notice of the contract for sale, protect himself against the purchaser's claim by taking a conveyance of the legal estate from the vendor, or from an express trustee thereof for the vendor (*o*). But otherwise the alienee is entitled to tack his own equitable interest to the legal estate if he can obtain it without any breach of trust on the part of the conveying party, so that if the legal estate in the property be outstanding in a mortgagee the alienee, on

Tacking by vendor's alienee.

(*n*) *Jones* v. *Stanley*, 2 Eq. Ca. Abr. 685, pl. 9; *Story* v. *Windsor*, 2 Atk. 630; *Tourville* v. *Naish*, 3 P. W. 306. In the last case a purchaser who had taken a conveyance and given a bond for the balance of the price without notice of a prior equitable incumbrance, and received notice thereof prior to payment of the money due on the bond, was postponed to the incumbrancer, as regards such money, on the ground that he would be entitled in equity to avoid payment of the money on the bond. The giving of a bond or covenant for payment of the whole or part of the purchase money may, perhaps, be properly treated as not constituting executed consideration within the meaning of the rule stated above, as any assignee of the debt so secured would take subject to the equities between the debtor and original creditor. But if the sale were made on the terms that a negotiable security should be given for the unpaid purchase money, it appears that the giving of such security ought to be treated as executed consideration, at least where the security has been negotiated before notice of the prior equity is received; for after the negotiable security has come to the hands of a *bonâ fide* holder for value the liability thereon can no longer be avoided.

(*o*) Above, p. 423, n. (*h*); *Potter* v. *Sanders*, 6 Hare, 1.

taking a transfer of the mortgage, even after receiving notice of the sale, can exclude the purchaser's rights (*p*).

Alienation by the purchaser of the land sold.

The purchaser is, as we have seen (*q*), fully entitled to dispose of the land sold as his own, at any time after the making of the contract for sale.

Assignment of the benefit of the contract.

Either party to the contract may lawfully assign over his beneficial interest therein (*r*), and the assignee may sue the other party in his own name in equity for the specific performance of the contract, making the assignor a party to the action (*s*); and this is the case whether the assignment of the benefit of the contract be made for the purpose of absolutely transferring the assignor's whole interest or of securing some lesser or other advantage to the assignee, such as the repayment of money lent (*t*). And the assignee of the interest of either party to the contract is entitled, under the Judicature Act of 1873, to sue the other party thereon in his own name at law if the assignment were an absolute assignment in writing under the hand of the assignor (not purporting to be by way of charge only), and express notice in writing of such assignment were given to the other party (*u*). Notice of the assignment

(*p*) *Taylor* v. *Russell*, 1892, A. C. 244; *Bailey* v. *Barnes*, 1894, 1 Ch. 25, 36, 37; above, pp. 420—423.

(*q*) Above, pp. 440, 474.

(*r*) *Wood* v. *Griffith*, 1 Swanst. 43, 55, 56; Sug. V. & P. 356; *Shaw* v. *Foster*, L. R. 5 H. L. 321, 333, 338.

(*s*) *Nelthorpe* v. *Holgate*, 1 Coll. 203; and see *Crosbie* v. *Tooke*, 1 My. & K. 431; *Morgan* v. *Rhodes*, ib. 435; *Dowell* v. *Dew*, 1 Y. & C. C. C. 345, 358; 12 L. J. (N. S.) Ch. 158, 162, 165; *Buckland* v. *Papillon*, L. R. 1 Eq. 477, 2 Ch. 67; Fry, Sp. Perf. 96, 3rd ed., 90, 4th ed.

(*t*) *Browne* v. *London Necropolis Co.*, 6 W. R. 188; *Shaw* v. *Foster*, L. R. 5 H. L. 321, 333, 338—344, 350.

(*u*) Stat. 36 & 37 Vict c. 66, s. 25, sub-s. 6. It has been decided that where there is an absolute assignment of the chose in action (in the sense of a complete transfer of the legal ownership thereof), the assignee may sue in his own name, although the assignment be made to secure the payment of money, and be subject to a proviso for redemption on such payment: *Tancred* v. *Delagoa Bay, &c. Rail. Co.*, 23 Q. B. D. 239; *Durham* v. *Robertson*, 1898, 1 Q. B. 765; *Hughes*

by either party of the benefit of the contract must, of course, be given to the other party, in order to prevent him from further performing the contract for the assignor's own use, which he would otherwise be entitled to do. And, as a rule, when one party to the contract receives notice of the assignment by the other of his interest in the contract, he is thenceforth bound to continue the performance of his part of the contract in favour of the assignee, and must no longer give to the assignor the benefit of the contract (*x*). But in order to oblige the other party to cease performance in favour of the original contractor, and to complete the contract with the assignee, there must be an effectual assignment of the original contractor's interest and notice of such assignment, and the assignee must show himself ready and willing to take the assignor's place in all respects, accepting the burthen, as well as the benefit, of the contract. Thus, where a purchaser of leaseholds deposited his contract with his bankers, together with a written agreement that he would at any time thereafter, at their request, execute to them a valid assignment of the contract, and the bankers gave formal notice to the vendor of the terms of this agreement only, not mentioning the deposit of the contract, or expressing any intention to stand in the purchaser's place, as regards its completion, and took no further steps to secure to themselves the benefit of the sale, it was considered that the terms of the agreement amounted, not to a present assignment of the benefit of the contract, but only to a promise to assign the same at a future time upon request; and it was held that the vendor was justified in executing, on payment of the

Shaw v. *Foster*.

v. *Pump House, &c. Co.*, 1902, 2 K. B. 190; cf. *Mercantile Bank of London* v. *Evans*, 1899, 2 Q. B. 613; *Jones* v. *Humphreys*, 1902, 1 K. B. 10; or although the assignment be made on trust for the assignor: *Comfort* v. *Betts*, 1891, 1 Q. B. 737.

(*x*) *Shaw* v. *Foster*, L. R. 5 H. L. 321, 333, 338, 339, 350; Wms. Pers. Prop. 35, 36, 15th ed.

purchase money by the original purchaser, a conveyance which took no notice of any interest on the banker's part (*y*).

As to the burthen of the contract after an assignment.

Of course, neither party to the contract can assign over the burthen thereof (*z*). It follows that when one party to the contract has assigned his interest therein he remains liable to perform his part of the contract; and the other party cannot sue the assignee, either for the specific performance or for damages for breach of the contract (*a*), unless he has accepted the assignee as occupying the assignor's place, in respect of the fulfilment of the contract. In this case there appears in truth to be a novation of the contract, and the assignor is not a necessary or proper party to any action thereon (*b*).

Transfer of part of the benefit of the contract.

If a party to the contract make no direct assignment, either legal or equitable, of his whole interest in the contract, but merely transfer by some independent act or agreement a part of the benefit which he is to derive from its performance—as if the vendor merely charge the purchase money with the payment of some smaller amount, or the purchaser agree to sell a part or to lease the whole or a part of the land sold—the transferee, being no party to the contract and being unable to assert an absolute assignment to himself of the original contractor's interest within the meaning of the Judicature Act of 1873, is not entitled to sue the other party to the original contract in his own name at law (*c*).

(*y*) *Shaw* v. *Foster*, L. R. 5 H. L. 321.

(*z*) *Tolhurst* v. *Associated Portland Cement Manufacturers*, 1902, 2 K. B. 660, 668.

(*a*) *Chadwick* v. *Maden*, 9 Hare, 188.

(*b*) *Holden* v. *Hayn*, 1 Mer. 47; *Hall* v. *Laver*, 3 Y. & C. 191.

(*c*) See above, p. 499; *Mercantile Bank of London* v. *Evans*, 1899, 2 Q. B. 613; *Jones* v. *Humphreys*, 1902, 1 K. B. 10. It is a question whether an absolute

But, in equity, one who has acquired from an original contractor a derivative interest in the subject-matter of a contract which is specifically enforceable, may claim, as against his grantor and the other party to the contract, to be an assignee *pro tanto* of the benefit of the contract, and to have the same specifically performed in his own favour accordingly. Thus, in *Browne* v. *London Necropolis Co.* (*d*), a vendor of land assigned a portion of the purchase money by way of mortgage, the mortgagee deposited this mortgage with another by way of sub-mortgage, and the sub-mortgagee sued the purchaser, his own mortgagor and the vendor, claiming, as against the purchaser, the specific performance of the contract. Wood, V.-C., held that the suit was maintainable in this form, considering that any person who was an assignee of the vendor might assert the vendor's rights under the agreement to purchase, and thus obtain the benefit of his charge through the medium of specific performance. The same rule appears to be applicable in the case of the acquisition by a third person from the purchaser of an estate or interest in the land sold. But to obtain such relief the person claiming it must submit to perform the original contract, so far as any duty thereby created relates to the interest acquired by him in the subject-matter of the agreement, and he must also procure the whole of the obligations undertaken by his assignor in the contract to be completely discharged (*e*). For a contractor cannot, by a partial

Browne v. *London Necropolis Co.*

assignment by the vendor of part of the purchase money would enable the assignee to sue the purchaser at law; but the better opinion appears to be that it would not: see *Brice* v. *Bannister*, 3 Q. B. D. 569; *Durham* v. *Robertson*, 1898, 1 Q. B. 765, 769—775, and the two cases cited above.

(*d*) 6 W. R. 188, where, however, specific performance was refused on other grounds.

(*e*) *Dyer* v. *Pulteney*, Barn. Ch. 160, 169, 170; *Shaw* v. *Foster*, L. R. 5 H. L. 321, 333, 338, 339, 350, 357, 358; and see *South Eastern Rail. Co.* v. *Knott*, 10 Hare, 122; *Fenwick* v. *Bulman*, L. R. 9 Eq. 165, where note that *Browne* v. *London Necropolis Co.* was not cited; *Government of Newfoundland* v. *Newfoundland Rail. Co.*, 13 App. Cas. 199, 210—213.

any more than by a complete (*f*) assignment of his interest under the contract, deprive the other party to the contract of his right to have the same performed in its entirety (*g*); and he can only enforce specific performance by the other party on the terms of carrying out his own part of the agreement (*h*).

Contract specifically enforceable against persons whose estate would be displaced by a conveyance.

Here it may be mentioned that contracts for sale of land are specifically enforceable, not only against the vendor's representatives in law and his assigns, who have or are taken to have notice of the contract, but also, as a rule, against all persons having any estate or interest in the land sold which would be displaced by the vendor's conveyance in pursuance of the contract (*i*). Thus, a contract for sale by a joint tenant of his share of the land is specifically enforceable against the other joint tenants claiming the estate by survivorship, the contract for sale operating in equity as a severance of the joint tenancy (*k*). And a contract for sale properly entered into by a trustee for or with power of sale is so enforceable against the *cestui-que-trusts* (*l*); but this is not the case if the circumstances were such as to make it a breach of trust for the trustee to enter into the contract (*m*). And where a trustee authorised to invest the trust funds in the purchase of land has entered into a contract of purchase in such circumstances as to constitute a breach of trust, the contract is not specifically enforceable by the vendor against the *cestui-que-trusts*, notwithstanding that they have been in possession of the

(*f*) Above, p. 501.
(*g*) Above, n. (*e*).
(*h*) Fry, Sp. Perf. 427 *sq.*, 3rd ed., 404 *sq.*, 4th ed.
(*i*) 2 Dart, V. & P. 1117; see above, pp. 471, 472.
(*k*) *Hinton* v. *Hinton*, 2 Ves. sen. 631, 634; *Brown* v. *Raindle*, 3 Ves. 256, 257.
(*l*) *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52; *Mortlock* v. *Buller*, 10 Ves. 292, 314; *Dowell* v. *Dew*, 1 Y. & C. C. C. 345; above, pp. 268 *sq.*
(*m*) See *Mortlock* v. *Buller*, 10 Ves. 292, 313; *White* v. *Cuddon*, 8 Cl. & Fin. 766; *Maw* v. *Topham*, 19 Beav. 576, 578.

land under the contract or with the vendor's leave, and the vendor's only remedies to obtain payment of the purchase money are to sue the trustee at law and to enforce his vendor's lien (*n*).

(*n*) *Ecclesiastical Commrs.* v. *Pinney*, 1899, 2 Ch. 729, 1900, 2 Ch. 736. From what was said in the judgments in this case it appears that the vendor would not have had any remedy to obtain payment of the purchase money from the *cestui-que-trusts* or out of the trust fund if the contract had not been a breach of trust.

CHAPTER XII.

OF THE COMPLETION OF THE CONTRACT.

§ 1. Of Completion generally.
§ 2. Of Searches and Inquiries.
§ 3. Of the Preparation of the Conveyance.
§ 4. Of the Adjustment of Accounts.
§ 5. Of the Execution of the Conveyance.

---

§ 1.—*Of Completion generally.*

After the investigation of title is completed, the purchaser either accepts the title and proceeds to completion, or he objects to the title and claims that the vendor has failed to perform that part of the contract. In the latter case the vendor either admits the purchaser's claim or disputes it, when the parties must pursue their legal remedies. But if the purchaser accept the title, the contract is either duly completed or it fails to be performed for some reason which is not precisely a matter arising upon the investigation of title, as that the contract was induced by mistake or by misrepresentation as to some fact, or by fraud, duress or undue influence, or cannot or ought not to be performed by reason of the incapacity of some party thereto or of the relation in which the parties stand to each other. Of course, any of these matters may be alleged as a ground for avoiding the contract before or during the investigation of title. But as the plan of this treatise has been to take the normal course of a contract for the sale of land, and to describe the incidents thereof as they occur in order of time, we

will first examine the cases in which the contract is duly completed, and will consider afterwards the various grounds on which the contract may be avoided.

Time for completion.

Let us now approach the subject of the completion of the contract in its ordinary course. And first, as to the time for completion. As we have seen (*a*), if when the investigation of title is concluded the vendor has shown a good title according to the contract, the purchaser is bound to accept the title and complete the contract accordingly. Under an open contract, the time for completion is when the vendor has shown a good title (*b*): but it is usual in formal contracts for the sale of land to fix a date for completion (*c*). When this is done, time is not, as a rule, of the essence of the contract, either in equity or, since the Judicature Acts commenced, at law (*d*). This rule, however, is subject to certain exceptions. The principle to which these exceptions are referable is the same as that on which the rule itself is founded (*e*). As the Court will enforce the specific performance of a contract, notwithstanding the failure to comply with some stipulation as to time, where it considers that the real intention of the parties was not to make the condition as to time material (*f*), so the Court will not order the specific performance of a contract after breach of a stipulation as to time, where the intention appears, either expressly or impliedly, that the observance of the time stipulation shall be an essential part of the contract (*g*). A stipulation, therefore, that a contract for the sale of land shall be completed on a particular day will be of the essence of the contract, if such were the intention of the parties; and this inten-

(*a*) Above, pp. 29, 37, 129, 143, 144.
(*b*) Above, pp. 22, 37.
(*c*) Above, p. 47.
(*d*) Above, pp. 48, 49; *Patrick* v. *Milner*, 2 C. P. D. 342.
(*e*) See *Hipwell* v. *Knight*, 1 Y. & C. 401.
(*f*) Above, pp. 48, 49.
(*g*) See the cases cited above, p. 48; *Patrick* v. *Milner*, 2 C. P. D. 342.

tion may be either expressed or implied. An express intention to make time of the essence of the contract is best shown by providing (in these terms) that time shall be of the essence of the contract as regards the particular act required to be done within a given time (*h*): but such an intention may also be gathered from other expressions in the contract (*i*). It must, however, be clearly shown, or the general rule of construction, that time is not of the essence of an agreement to complete a sale of land on a given day, will be applied (*k*). With regard to the implication of an intention to make time of the essence of a contract to complete a sale of land on a particular day, we have seen (*l*) that such an intention may be inferred from the nature of the property or from the surrounding circumstances. Thus, time is of the essence of the contract where the value of the property sold must necessarily increase or diminish according to the effluxion of time (*m*), as in the case of sales of remainders or reversions other than those expectant merely on a lease at a profitable rent (*n*), of estates or interests determinable with life (*o*), or of mining leases or short leaseholds (*p*). So, where the property is used for trade or business purposes, time is generally of the essence of the contract (*q*), as on the purchase of a public-house (*r*), mill or manufactory as a going concern, or of mines for the purpose of working them (*s*). But in all these cases the question whether time is material is to be determined by ascertaining the intention of the

(*h*) *Lloyd* v. *Rippingale*, cited 1 Y. & C. 410; *Parkin* v. *Thorold*, 16 Beav. 59, 65; see above, pp. 51, 59.

(*i*) *Hipwell* v. *Knight*, 1 Y. & C. 401, 417; *Barclay* v. *Messenger*, 43 L. J. N. S. Ch. 449, 455.

(*k*) Above, p. 506; *Webb* v. *Hughes*, L. R. 10 Eq. 281, 286.

(*l*) Above, p. 49.

(*m*) *Hipwell* v. *Knight*, 1 Y. & C. 401, 416.

(*n*) Above, p. 382.

(*o*) See *Withy* v. *Cottle*, T. & R. 78; 1 Dart, V. & P. 484.

(*p*) *Hudson* v. *Temple*, 29 Beav. 536, 543.

(*q*) *Coslake* v. *Till*, 1 Russ. 376; *Walker* v. *Jeffreys*, 1 Hare, 341, 348.

(*r*) Above, p. 425.

(*s*) *Parker* v. *Frith*, 1 S. & S. 199, n.; *Maebryde* v. *Weekes*, 22 Beav. 533; Fry, Sp. Perf. 494, 3rd ed., 467, 468, 4th ed.

parties (*t*); and if it appear from the contract that they contemplated delay in completion after the day fixed therefor, as where the payment of interest in case of delay in completion is expressly provided for (*u*), it will not be considered that compliance with the time stipulation is essential (*x*). As to inferring an intention to make time of the essence of the contract from the surrounding circumstances, this may be illustrated by the case of a contract to sell a house for the purpose of residence (*y*), or to sell land for erecting a mill or factory (*z*), or for any other immediate purpose (*a*): but it does not appear that such an intention will be inferred where the vendor does not expressly or impliedly offer the property as available for the required purpose and the purchaser does not disclose to him what use he desires to make of it (*b*). An express or implied stipulation that time shall be of the essence of the contract may be waived either by express agreement or by the conduct of the parties, as where they continue negotiations as to title after the day fixed for completion (*c*).

Making time of the essence, where not originally so, by subsequent notice.

As we have seen (*d*), where time is not originally of the essence of the contract, it may be made so, in the case of unreasonable delay by either party in the performance of his part of the contract, by a notice served on him by the other party and requiring him to do the acts which he has so delayed to perform, within a specified time; provided that the time so specified allow him

(*t*) Above, p. 506.
(*u*) Above, pp. 56, 62.
(*x*) *Webb* v. *Hughes*, L. R. 10 Eq. 281, 286; *Patrick* v. *Milner*, 2 C. P. D. 342; and see *Jones* v. *Gardiner*, 1902, 1 Ch. 191.
(*y*) *Levy* v. *Lindo*, 3 Mer. 81, 84; *Gedye* v. *Montrose*, 26 Beav. 45; *Tilley* v. *Thomas*, L. R. 3 Ch. 61.
(*z* See *Wright* v. *Howard*, 1 S. & S. 190.
(*a*) See *Jones* v. *Gardiner*, 1902, 1 Ch. 191.
(*b*) See *Boehm* v. *Wood*, 1 J. & W. 419, 422; *Tilley* v. *Thomas*, L. R. 3 Ch. 61, 67, 70; *Webb* v. *Hughes*, L. R. 10 Eq. 281, 286.
(*c*) *Hipwell* v. *Knight*, 1 Y. & C. 401; *Webb* v. *Hughes*, L. R. 10 Eq. 281.
(*d*) Above, p. 40.

such a period commencing from the date of service of the notice as is reasonably necessary for accomplishing the acts required.

Time for performance by vendor of a condition which is a term of the sale.

Here it may be mentioned that, if it be a term of the contract for sale that some condition shall be performed by the vendor, as that he shall procure a mortgagee of the land to allow the amount advanced to remain on the security, and a day be fixed for completion, time being of the essence of the contract in this respect, the vendor may, as a rule, well perform the condition at any time before the day fixed for completion (*e*).

The acts to be performed on either side for completion.

Completion of the contract consists on the part of the vendor in conveying with a good title the estate contracted for in the land sold and delivering up the actual possession or enjoyment thereof; on the purchaser's part it lies in accepting such title, preparing and tendering a conveyance for the vendor's execution, taking possession and paying the price (*f*). But the performance of either party's duty in this respect cannot be exacted by the other unless he himself be ready to fulfil his own part of the contract. Thus the vendor cannot require payment of the price and call upon the purchaser to take possession unless and until he have shown a good title and be ready and willing to execute a valid conveyance to the purchaser; nor can the purchaser oblige the vendor to convey and give up possession of the land without himself accepting the title, tendering a conveyance for execution, and paying the price. And this is so, not only under an open contract, but also where a day is fixed for completion in the ordinary way, time not being of the essence of the contract; either party being at liberty in such case to decline to complete the

(*e*) *Smith* v. *Butler*, 1900, 1 Q. B. 694, 699.

(*f*) Above, pp. 22, 28, 29, 37 38.

contract, notwithstanding that the day for completion arrive or be past, except on the terms of the other discharging his duty (*g*).

The purchaser's duties.

Let us first consider the purchaser's duties. The first step towards completion required of him is to accept the title, if the title shown on the abstract and proved by the documents and other evidence produced for verification of the abstract be a good title according to the contract (*h*). No formal act or notification of such acceptance is required; it takes place when the vendor's last answer to the purchaser's last outstanding requisition is received without objection (*i*). Such acceptance, however, is merely an acceptance of the title so put forward by the vendor (*k*); it does not preclude objection to the title on account of defects subsequently discovered from other sources than the information supplied by the vendor, as from searches or other inquiries made by the purchaser (*l*), provided of course that the title agreed to be taken were not so limited by special stipulation as to preclude such objection (*m*). Neither does acceptance of the title prevent objections as to matters which are properly matters of conveyance rather than of title (*n*). It is important to observe this, as a part of the proper investigation of every title consists in searching for registered incumbrances, making inquiries of tenants or other occupiers as to the nature

Acceptance of the title.

Searches and inquiries to be made by the purchaser.

(*g*) See *Martin* v. *Smith*, 6 East, 555; *Jones* v. *Mudd*, 4 Russ. 118; *Poole* v. *Hill*, 6 M. & W. 835; *Tilley* v. *Thomas*, L. R. 3 Ch. 61; *Phillips* v. *Silvester*, L. R. 8 Ch. 173, 176—178; *Noble* v. *Edwardes*, 5 Ch. D. 378; *Mostyn* v. *Mostyn*, 1893, 3 Ch. 376; above, pp. 50, 448, 450.

(*h*) See above, pp. 29, 30, 86, 95, 114, 132, 143, 144.

(*i*) See cases cited above, pp. 22, n. (*j*), 50, n. (*r*); *Re Highett and Bird's Contract*, 1902, 2 Ch. 214, 1903, 1 Ch. 287.

(*k*) Above, p. 150.

(*l*) Above, pp. 150, 151; *Re Jackson and Oakshott*, 14 Ch. D. 851; *Re Monckton and Gilzean*, 27 Ch. D. 555; *Re Haedicke and Lipski's Contract*, 1901, 2 Ch. 666, 669, 670; *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258.

(*m*) Above, pp. 163—168.

(*n*) Above, pp. 130—132, 145, 151; *Mostyn* v. *Mostyn*, 1893, 3 Ch. 376; *Re Hughes and Ashley's Contract*, 1900, 2 Ch. 595.

of their interests, or, where vacant possession is to be given on completion, ascertaining that the vendor is in possession; and these searches and inquiries should be so made as to extend over the very latest possible time before completion (*o*). And it may happen that an objection as to some matter of conveyance may be such as to justify the purchaser in refusing to complete the contract (*p*).

§ 2.—*Of Searches and Inquiries.*

Searches, their object.

The object of searching for incumbrances or other matters, which are registered or enrolled, is to ascertain that the vendor's title is not adversely affected by any judgment, Crown debt, writ or other process of execution, life annuity, land charge, *lis pendens*, bankruptcy, deed of arrangement, disentailing assurance, deed acknowledged before the year 1883 by a married woman entitled at common law, or by registration of the title or any registered disposition under the Land Transfer Acts, 1875 and 1897 (*q*), or in the case of lands in Middlesex or Yorkshire, by any disposition thereof already registered (*r*), or in the case of copyholds by any assurance already enrolled (*s*).

Judgments, Crown debts and writs of execution.

With regard to judgments and Crown debts of record or by specialty in statutory form or arising from public accountantship to the Crown, all of which at one time were, when registered, charges on the debtor's lands (*t*), it is now provided by the Land Charges Act, 1900 (*u*), that a judgment (*v*) or recognizance, whether obtained

(*o*) Sug. V. & P. 538; 1 Dart, V. & P. 518 *sq.*, 569.

(*p*) Above, pp. 131, 132, 145, 146; *Mostyn* v. *Mostyn*, 1893, 3 Ch. 376.

(*q*) Stats. 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65.

(*r*) Above, pp. 362 *sq.*

(*s*) See Wms. Real Prop. 261—287, 418, 583—586, 19th ed.

(*t*) Ibid. 263, 264, 278, 279.

(*u*) Stat. 63 & 64 Vict. c. 26, s. 2 (1).

(*v*) Here including any order or decree having the effect of a judgment, except an order made

or entered into on behalf of the Crown or otherwise, either before or after the commencement of the Act (*x*), shall not operate as a charge on land, or on any interest in land, or on the unpaid purchase money for any land, unless or until a writ or order for the purpose of enforcing it is registered under the Land Charges Act of 1888 (*y*); and this provision applies to any inquisition finding a debt due to the Crown, and any obligation or specialty made to the Crown, and any acceptance of office from or under the Crown, whatever may have been its date, in like manner as it applies to a judgment (*z*). Under the same Act (*a*), too, no entry shall be made, except under an order of the High Court, in the register of judgments established by the Judgments Act, 1838 (*b*), the register of Crown debts established by the Judgments Act, 1839 (*c*), the registers of writs of execution established by the Law of Property Amendment Act, 1860 (*d*), and the Judgments Act, 1864 (*e*), or the register of Crown process of execution established by the Crown Suits Act, 1865 (*f*). And all these registers, as well as the registers of *lis pendens* and life annuities (*g*), have been transferred from the Central Office of the Supreme Court to the Office of Land Registry (*h*). As regards writs or other processes of execution, we have seen (*i*) that, by the Land Charges Act of 1888 (*k*), every writ or order affecting land (including hereditaments of any tenure)

by a Court having bankruptcy jurisdiction in exercise of that jurisdiction: see sect. 6 (3); stat. 51 & 52 Vict. c. 51, s. 4.

(*x*) 1st July, 1901; stat. 63 & 64 Vict. c. 26, s. 6 (2).

(*y*) Stat. 51 & 52 Vict. c. 51.

(*z*) Stat. 63 & 64 Vict. c. 26, s. 2 (2); see Wms. Real Prop. 278, 279.

(*a*) Sect. 2 (3).

(*b*) Stat. 1 & 2 Vict. c. 110, ss. 19, 21.

(*c*) Stat. 2 & 3 Vict. c. 11, s. 8.

(*d*) Stat. 23 & 24 Vict. c. 38.

(*e*) Stat. 27 & 28 Vict. c. 112.

(*f*) Stat. 28 & 29 Vict. c. 104; see Wms. Real Prop. 264—266, 279, 19th ed.

(*g*) See below, pp. 517, 523.

(*h*) Stat. 63 & 64 Vict. c. 26, s. 1; and Order thereunder, W. N. 18th Aug. 1900.

(*i*) Above, p. 490.

(*k*) Stat. 51 & 52 Vict. c. 51, ss. 4—6.

issued or made by any Court for the purpose of enforcing a judgment (*l*), and every delivery in execution or other proceeding taken in pursuance of any such writ or order shall be void, as against a purchaser for value (*m*) of the land, unless the writ or order is for the time being duly registered against the name of the person whose land is affected in the Office of Land Registry. This enactment was extended by the Land Charges Act, 1900 (*n*), to every writ or order affecting land issued or made by any Court for the purpose of enforcing a judgment, whether obtained on behalf of the Crown or otherwise, and whether obtained before or after the commencement of the Act, and to every delivery in execution or proceeding taken in pursuance of any such writ or order. Registration under these Acts ceases to have effect at the expiration of five years, but may be renewed, and if renewed has effect for five years from the date of renewal (*o*). With regard, therefore, to judgments, Crown debts or liabilities of the kind mentioned in the Land Charges Act, 1900, and process of execution, whether at suit of the Crown or of a common person, the purchaser need only now ascertain that no writ or order affecting the land sold has been registered or re-registered within the last five years; and if this be so, and the possession of the lands sold be in accordance with the title shown, he may safely complete the purchase (*p*). But if any such

(*l*) Above, p. 511, n. (*v*).

(*m*) Including a mortgagee or lessee, or other person who for valuable consideration takes any interest in or a charge on land: sect. 4.

(*n*) Stat. 63 & 64 Vict. c. 26, s. 3.

(*o*) Stat. 51 & 52 Vict. c. 51, s. 5 (3).

(*p*) It cannot now be necessary, as regards judgments suffered or Crown debts incurred before the commencement of the Land Charges Act, 1900, to search in any of the registers closed as above mentioned: p. 512. If before that Act any such judgments or debts were charges on any lands without the lands having been actually delivered in execution (as might happen in the case of a judgment entered up before the 23rd July, 1860, and kept alive by payment of interest or otherwise, or a Crown debt incurred before the 2nd Nov. 1865), it appears that on the

writ or order be registered, the purchaser must not complete without the concurrence of every person entitled thereunder to any interest in the land (*q*). And this is the case whether such writ (*r*) have been followed by actual delivery in execution or not, as the effect of the Land Charges Act, 1900 (*s*), read together with the unrepealed provisions of the Judgments Act, 1838 (*t*), appears to be that a judgment shall operate as a charge on the judgment debtor's lands, when the writ or order enforcing it has been registered under the Land Charges Act of 1888 (*u*), actual delivery in execution being no longer a condition precedent to the lien of a judgment (*x*). So Crown debts of the kind included in the Land Charges Act, 1900 (*y*), have the binding effect on the debtor's lands which was given to them by common law or early statute (*z*), so soon as a writ or order for the purpose of enforcing them is registered. But as no charge now arises in the case of Crown debts of this kind, or of judgments, until registration of the writ or

commencement of that Act they ceased to be charges, unless or until a writ or an order to enforce them had been or should be registered. If the lands had been actually delivered in execution prior to that Act, it appears that, by virtue of sect. 3 of the Act (above, p. 513), unless the land had been already sold under the Judgments Act, 1864, it became necessary on the commencement of the Act of 1900 to register the writ or other process of execution, and that in default of such registration the delivery in execution would be void as against the purchaser. But the purchaser must ascertain that the possession of the land sold is in accordance with the title shown, because he is deemed to have notice of the interests of all persons in occupation thereof, and it may be held that, if the purchaser have notice of a delivery in execution under an unregistered writ or process, the same is valid in equity as against him: see below, p. 515.

(*q*) See above, pp. 489—491.

(*r*) An order appointing a receiver is of itself equivalent in equity to actual delivery in execution: below, p. 515, n. (*e*).

(*s*) 63 & 64 Vict. c. 26, s. 2.

(*t*) Stat. 1 & 2 Vict. c. 110, s. 13.

(*u*) Stat. 51 & 52 Vict. c. 51.

(*x*) Under the Judgments Act, 1864, no judgment thereafter entered up affected any land until actually delivered in execution. But this enactment was repealed by the Land Charges Act, 1900: see stats. 27 & 28 Vict. c. 112, s. 1; 63 & 64 Vict. c. 26, s. 5; Wms. Real Prop. 266, 19th ed.

(*y*) See above, n. (*s*); and p. 512.

(*z*) See Wms. Real Prop. 278, 19th ed.

order, the purchaser will not be adversely affected by notice or knowledge of any of these Crown debts incurred by or any judgments against the vendor or his predecessors in title, so long as the purchase is completed before such registration takes place. Debts due to the Crown by simple contract and not arising from the above-mentioned accountantships (*a*) did not, under the old law, give rise to any lien on the debtor's lands until they were made of record for the purpose of enforcing them (*b*); and they do not now give rise to such a lien. The purchaser may therefore safely disregard these liabilities of the vendor, notwithstanding that he have notice of them; they could only affect him if his purchase were made, not in good faith, but with intent to defraud the Crown (*c*). With regard to unregistered process of execution against lands, it is to be observed that the same is made void only as against purchasers for value (*d*). The actual delivery of any lands in execution, under an unregistered writ of *elegit* or receiving order, still vests in the judgment creditor an estate by *elegit*, which is valid as against the judgment debtor himself, his representatives in law and assigns by voluntary conveyance (*e*). It appears there-

Notice of judgments, or Crown debts of record or by specialty or public accountantship.

Crown debts by simple contract.

Notice of unregistered process of execution.

(*a*) Above, p. 511.

(*b*) *R.* v. *Smith*, Wightw. 34; *Casberd* v. *A.-G.*, 6 Price, 411, 473—476; Chitty on the Prerogative of the Crown, 293—296; Sug. V. & P. 545.

(*c*) Sug. V. & P. 545.

(*d*) Above, p. 513.

(*e*) See above, p. 491. The estate by *elegit* vests in the judgment creditor, in the case of execution under a writ of *elegit*, when he has got the sheriff's return to the writ, and in the case of equitable execution by the appointment of a receiver, when the order for a receiver is made. In the case of an *elegit*, the sheriff delivers to the judgment creditor symbolical not actual possession of the land; but the latter, when tenant by *elegit*, may, if the land were in the occupation of a tenant, distrain for rent subsequently becoming due without any attornment by such tenant. And if the land were in the judgment debtor's own occupation, the tenant by *elegit* may obtain actual possession thereof by peaceable entry or by action: see *Hoe's case*, 5 Rep. 89b; *Taylor* v. *Cole*, 3 T. R. 292, 295; *Rogers* v. *Pitcher*, 6 Taunt. 202, 206, 207; *Sharp* v. *Key*, 8 M. & W. 379; *Lloyd* v. *Davies*, 2 Ex. 103; *Hughes* v. *Lumley*, 4 E. & B. 274; *Guest* v. *Cowbridge Ry. Co.*, L. R.

fore that the actual delivery in execution under unregistered process of lands sold, whether made before or pending the completion of the contract for sale, is an objection to the title, the estate sold being partly vested in some person, whom the vendor has no right to direct to convey to the purchaser (*f*); and it seems by analogy to the rule applied under the old law as to the sale of lands already parted with by voluntary conveyance (*g*), that the vendor could not enforce the specific performance of the contract, upon the ground that conveyance to the purchaser would render the execution void. Nor could the purchaser himself be advised to rely upon this ground and accept the title, if he had notice of the execution; for it may be argued that, on the principle applied in the case of unregistered conveyances of lands in Middlesex or Yorkshire (*h*), of undocketed judgments under the old law (*i*), and of unregistered life annuities under the Judgments Act, 1855 (*k*), executions actually put in force against lands under unregistered process are valid in equity as against purchasers who have notice of the same. Until this point be precisely

6 Eq. 619; *Hatton* v. *Haywood*, L. R. 9 Ch. 229, 236; *Re Pope*, 17 Q. B. D. 743, 745, 751; *Re Anthony*, 1892, 1 Ch. 450; *Johns* v. *Pink*, 1900, 1 Ch. 296. It is submitted that the case of *Re Hobson*, 33 Ch. D. 493, if well decided, which is doubtful, lays down no more than this: that the symbolical delivery of land by the sheriff under an *elegit* may be equivalent to a "seizure" thereof within the meaning of sect. 45 (2) of the Bankruptcy Act, 1883. It appears that a judgment creditor, who has obtained actual delivery in execution of the judgment debtor's lands under unregistered process, is entitled to obtain an order for sale under the Judgments Act, 1864 (stat. 27 & 28 Vict. c. 112), s. 4, as the words in that enactment which required registration of the process of execution as a condition precedent to obtaining an order for sale were repealed by the Land Charges Act, 1900 (stat. 63 & 64 Vict. c. 26), s. 5.

(*f*) Above, pp. 130—132.

(*g*) Above, p. 375, n. (*n*).

(*h*) Above, p. 362; Wms. Real Prop. 206, 19th ed.

(*i*) *Davis* v. *Strathmore*, 16 Ves. 419; Sug. V. & P. 521.

(*k*) *Greaves* v. *Tofield*, 14 Ch. D. 563. The language used in the Judgments Act, 1855, is different from that used in the Land Charges Act, 1888. But *Greaves* v. *Tofield* was expressly decided on the principle applied in construing the Middlesex and Yorkshire Registry Acts, of which the language closely resembles that of the Land Charges Act, 1888.

decided, the purchaser should, it is conceived, refuse to complete in such a case, except with the concurrence of every person interested by virtue of the execution in the land sold (*l*).

Orders made in exercise of bankruptcy jurisdiction.

It will have been observed (*m*) that the provisions of the Land Charges Acts, 1888 and 1900, do not apply to orders made by a Court having jurisdiction in bankruptcy in the exercise of that jurisdiction. Such orders, if made for the payment of any sum of money, or any costs, charges or expenses, appear to have the effect of a judgment (*n*), and therefore to operate as a charge on the lands of the person ordered to pay (*o*): but all the enactments which rendered registration of the order or of the writ of execution or actual delivery in execution a condition precedent to such lien have been repealed (*p*). Such orders may be made, for example, where one who has contracted with a person afterwards adjudged bankrupt applies in the bankruptcy for rescission of the contract and is ordered to pay damages or costs (*q*). There do not appear to be any means of discovering whether lands sold are affected by a liability of this kind.

Annuities or rent-charges.

Annuities or rent-charges which may affect purchasers of land are of two kinds, those granted in exercise of the ordinary right of alienation incident to ownership, and those created under statutory authority, generally for the purpose of securing the repayment of money advanced for the improvement of land. Of annuities

(*l*) See above, pp. 489—491.

(*m*) Above, p. 511, n. (*v*).

(*n*) See stats. 1 & 2 Vict. c. 110, s. 18; 46 & 47 Vict. c. 52, ss. 92, 93, 100; R. S. C. 1883, Orders 42 (rr. 3, 24, 28), 43 (r. 1); Bankruptcy Rules, 1886, r. 93.

(*o*) Stat. 1 & 2 Vict. c. 110, s. 13.

(*p*) Stat. 63 & 64 Vict. c. 26, s. 5.

(*q*) Above, p. 487. An example of an appeal made by a contractor with a bankrupt to bankruptcy jurisdiction and dismissed with costs against him occurs in *Re Bastable*, 1901, 2 K. B. 518.

of the former kind, those granted on or after the 26th of April, 1855, otherwise than by marriage settlement or will, for a life or lives or for any estate determinable on a life or lives, are required to be registered, formerly in the Court of Common Pleas and now in the Office of Land Registry, in order to affect the lands charged therewith as against purchasers (*r*). Life annuities so required to be registered are, however, valid in equity, though unregistered, as against purchasers who have notice of them (*s*). Annuities or rent-charges of the former kind, other than those so required to be registered, of course take effect according to their nature; if legal, they will affect the lands charged in the purchaser's hands; if equitable, the purchaser will take the lands free from them, only so far as he can claim under a conveyance of the legal estate made in good faith and for executed valuable consideration without notice of them, and not otherwise (*t*). If any such rent-charges exist, they ought to be stated on the abstract (*u*): but if not so disclosed, they are not generally discoverable either by any search, or by the absence of the title deeds, as a person having a rent only is not entitled to the custody of the title deeds of the land charged therewith (*x*).

Notice of life annuities.

Land charges.

With regard to rent-charges of the latter kind, those coming under the description of a land charge (*y*) in the

(*r*) Stat. 18 & 19 Vict. c. 15, ss. 12, 14; above, p. 386. Annuities for or determinable on any life or lives, granted for valuable consideration, and not secured on lands of equal or greater value than the annuity, and belonging to the grantor for an estate in fee or in tail in possession, were formerly made void by statute, unless a memorial thereof were duly enrolled in the Court of Chancery: stats. 17 Geo. III. c. 26; 53 Geo. III. c. 141; 3 Geo. IV. c. 92; 7 Geo. IV. c. 75. But these statutes were repealed by the Act abolishing the Usury Laws: stat. 17 & 18 Vict. c. 90.

(*s*) *Greaves* v. *Tofield*, 14 Ch. D. 563.

(*t*) Above, pp. 496—498; *Clemow* v. *Geach*, L. R. 6 Ch. 147.

(*u*) See above, pp. 86 *sq.*, 141.

(*x*) Wms. Real Prop. 462, 13th ed.; 579, 19th ed.

(*y*) Stated above, p. 386, n. (*f*).

Land Charges Act of 1888 (*z*), and created after that year, are void as against a purchaser for value (*a*) of the land charged therewith, unless registered in the register of land charges at the Office of Land Registry. And rent-charges coming under the same description and created before the year 1889, but assigned over by act *inter vivos* after the year 1888, are not recoverable after the expiration of one year from the first of such assignments, as against a purchaser for value (*b*) of the land charged therewith, unless registered in the same register (*c*). As it may be contended that land charges so required to be registered are valid in equity as against purchasers who have notice of them (*d*), purchasers cannot be advised to disregard any such charges, though not registered, of which they have notice. Land improvement charges created by the authority of statute before the year 1889 were not declared to be void, as against purchasers, if not registered: but some of them were required to be registered and are discoverable by search. Thus, charges created under the Public Money Drainage Acts (*e*), the Private Money Drainage Act, 1849 (*f*), or the Improvement of Land Act, 1864 (*g*),

Notice of unregistered land charges.

Land improvement charges created before 1889.

(*z*) Stat. 51 & 52 Vict. c. 51, s. 12.

(*a*) Above, p. 513, n. (*m*).

(*b*) Above, p. 513, n. (*m*).

(*c*) Sect. 13.

(*d*) See above, p. 516, and n. (*k*).

(*e*) These charges were to be made by certificate of the Inclosure Commissioners, and to consist of rent-charges payable for twenty-two years: stats. 9 & 10 Vict. c. 101 (see s. 34), amended by 10 & 11 Vict. c. 11: 11 & 12 Vict. c. 119; 12 & 13 Vict. c. 100, ss. 30, 31 (repealed by 27 & 28 Vict. c. 114); 13 & 14 Vict. c. 31; 19 & 20 Vict. c. 9.

(*f*) These consist of rent-charges payable for twenty-two years and granted by certificate of the Inclosure Commissioners, and, if charged on lands in Middlesex or York, were to be registered in the county register: stat. 12 & 13 Vict. c. 100 (see ss. 10, 14), amended by 19 & 20 Vict. c. 9, and repealed by 27 & 28 Vict. c. 114.

(*g*) These were to be made by absolute order of the Inclosure Commissioners creating a rent-charge for the term thereby fixed, not exceeding twenty-five years: stat. 27 & 28 Vict. c. 114 (see ss. 26, 49), amended by 62 & 63 Vict. c. 46, and extended by 33 & 34 Vict. c. 56 and 34 & 35 Vict. c. 84 to the erection, completion or improvement of limited owners' residences; by 40 & 41 Vict. c. 31 to waterworks; by 45 & 46 Vict. c. 38, s. 30, to all improvements authorised by the Settled Land Act, 1882; and by 60 & 61 Vict.

before the year 1889, were registered against the name of the landowner affected thereby at the office of the Inclosure Commissioners, afterwards styled the Land Commissioners (*h*), whose powers and duties were in the year 1889 transferred to the Board of Agriculture (*i*), at whose office the search for such charges should be made (*k*). Land improvement charges created under the General Land Drainage and Improvement Company's Act (*l*), the Lands Improvement Company's Acts (*m*), or the Land Loan and Enfranchisement Company's Act (*n*) may also be discovered by search at the office of the Board of Agriculture, as well as by search at the companies' offices respectively (*o*). Charges under the Artisans' and Labourers' Dwellings Acts, 1868 to 1882 (*p*), in favour of owners who themselves com-

c. 44 to the supply of water to a rural district. Under the Act of 1864 (sect. 56) the rent-charges thereby created were required to be registered in the Office of Land Registry: but the words requiring this were repealed by stat. 62 & 63 Vict. c. 46, s. 5, which also prohibited any entry *or search* from being made in any register kept at the Office of Land Registry under sect. 56 of the Act of 1864, except under an express order of the High Court. This does not appear to prohibit search at the Office of the Board of Agriculture.

(*h*) Stat. 45 & 46 Vict. c. 38, s. 48.

(*i*) Stat. 52 & 53 Vict. c. 30.

(*k*) See Elphinstone & Clark on Searches, 109—112; above, n. (*g*).

(*l*) These were to be created by absolute order of the Inclosure Commissioners: stat. 12 & 13 Vict. c. xci. (see s. 56) (local and personal).

(*m*) These were to be created by absolute order of the Inclosure Commissioners charging the lands by way of annuity for not more than twenty-five years; and, if affecting lands in Middlesex or Yorkshire, were to be registered in the county register: stat. 16 & 17 Vict. c. cliv. (see ss. 48, 54), amended by 18 & 19 Vict. c. lxxxiv.; 22 & 23 Vict. c. lxxxii.; and 26 & 27 Vict. c. cxl. (local and personal Acts).

(*n*) These are rent-charges for terms not exceeding twenty-five years created by absolute order of the Inclosure Commissioners, and, if affecting lands in Middlesex or Yorkshire, were to be registered in the county register: stat. 23 & 24 Vict. c. clxix. (see ss. 37, 38, 47), amended by 23 & 24 Vict. c. cxciv. (local and personal).

(*o*) Elphinstone & Clark on Searches, 117—119.

(*p*) These charges were made by order of the local authority charging the lands with an annuity for thirty years, and, if affecting lands in Middlesex or Yorkshire, were required to be registered in the county register. Where the local authority themselves executed the works, the costs, charges and expenses so incurred might be charged on the lands by order of the Court

pleted the works required under the Acts by the local authority, had to be recorded and may be discovered by search at the office of the Clerk of the Peace for the county in which the lands affected lie; where also may be found evidence of any charges created under the Landowners Drainage and Improvement Company's Act (*q*) and the Landowners West of England and South Wales Land Drainage Company's Act (*r*). Charges under the Sewers Amendment Act, 1833 (*s*), will be found registered in the Court of Sewers, if any, for the district; or if made by a drainage board constituted under the Land Drainage Act, 1861 (*t*), at the office of the Board (*u*). Rent-charges granted under the Public Health Act, 1875 (*x*), for securing the repayment of money advanced for private improvement expenses, are required to be registered and may be discovered by search at the office of the local authority. There are also some cases in which charges authorised by Local Improvement Acts are required to be registered (*y*).

Land improvement charges not

Amongst land improvement rent-charges which did

of Quarter Sessions: see stats. 31 & 32 Vict. c. 130 (see ss. 19, 25—30); 38 & 39 Vict. c. 36; 42 & 43 Vict. cc. 63 and 64; 43 Vict. c. 8; 45 & 46 Vict. c. 54; all repealed by the Housing of the Working Classes Act, 1890 (stat. 53 & 54 Vict. c. 70): see ss. 36, 37, as to charging orders in favour of owners completing works themselves, which are to be registered in Middlesex or Yorkshire in the county register.

(*q*) Stat. 10 & 11 Vict. c. cexii.

(*r*) Stat. 11 & 12 Vict. c. cxlii.; this company was ordered to be wound up in 1874: see *Landowners West of England, &c. Co.* v. *Ashford*, 16 Ch. D. 411, 424; Elphinstone & Clark on Searches, 119, 120.

(*s*) These are made by a decree or Ordinance of the Commissioners of Sewers and are payable by instalments over a period not exceeding fourteen years: stat. 3 & 4 Will. IV. c. 22 (see s. 41).

(*t*) Stat. 24 & 25 Vict. c. 133, s. 67.

(*u*) Elphinstone & Clark on Searches, 114, 115.

(*x*) These are granted by the local authority by way of rent-charge for a term not exceeding thirty years: stat. 38 & 39 Vict. c. 55, ss. 240, 241.

(*y*) As those created under the Improvement of Buildings Act, 1860 (c. cxxix.), as to lands in Middlesex, the Bradford Waterworks and Improvement Act, 1875 (c. lxxx.), and the Leeds Improvement Act, 1877 (c. clxxviii.), where registration in the county register is required; Elphinstone & Clark on Searches, 121, 123.

requiring registration before 1889.

not before the year 1889 require any registration of any kind, are those created under stat. 8 & 9 Vict. c. 56 (*z*). Various local Acts have also authorised the creation of rent-charges to repay money advanced for improvements, without the requirement of registration (*a*).

Statutory charges on land of a principal sum, not payable by way of annuity.

Besides the land improvement charges payable by way of terminable annuity, there are other statutory charges on land of some principal sum not so payable; and these were not required to be registered. Among such charges are those given by the Public Health Act, 1875 (*b*), to secure the repayment with interest of the amount of the expenses incurred by any local authority under the Act (*c*), for the repayment whereof the owner of the premises, for or in respect of which the expenses were incurred, is made liable either under the Act or by agreement with the local authority. Similar charges have been created by various local Acts, sometimes by express words, sometimes impliedly, as by giving power to distrain for the amount due (*d*). The charge given under the Agricultural Holdings (England) Act, 1883 (*e*), to a landlord who has paid to a tenant compensation under that Act, also required no registration.

What are *land charges* created after 1888

It appears that all the land improvement rent-charges created after the year 1888, at the instance of the owners of the land under any of the above-mentioned Acts, come within the description of land charges contained

(*z*) Enabling the repayment, by instalments extending over not more than twenty-five years, of moneys expended in the improvement of settled estates to be charged thereon with the sanction of the Court of Chancery; but apparently seldom resorted to: Elphinstone & Clark on Searches, 115.

(*a*) See Elphinstone & Clark on Searches, 121 *sq.*

(*b*) Stat. 38 & 39 Vict. c. 55, s. 257: see *Corpn. of Birmingham* v. *Baker*, 17 Ch. D. 782; *Re Bettesworth and Richer*, 37 Ch. D. 535; *Re Smith's Settled Estates*, 1901, 1 Ch. 689: above, pp. 142, 455.

(*c*) As in sewering, paving or lighting private streets under sect. 150 of the Act.

(*d*) See Elphinstone & Clark on Searches, 121 *sq.*; above, pp. 142, 455, 466.

(*e*) Stat. 46 & 47 Vict. c. 61, ss. 29—32.

in the Land Charges Act of 1888 (*f*), and must be registered accordingly in order to be effectual as against a purchaser for value of the land charged. So, it seems, must any other land improvement charge effected under the same Acts at the instance of the owner of the land, but not payable by way of annuity (*g*); likewise the above-mentioned charge given by the Agricultural Holdings (England) Act, 1883 (*h*). But it has been held that the charges given by sect. 257 of the Public Health Act, 1875 (*i*), and similar charges imposed by statute on lands against their owner's will (*k*), are not land charges within the meaning of the Land Charges Act of 1888 (*l*), and do not, since that Act, require to be registered (*m*). A charge similar to that given by sect. 257 of the Public Health Act, 1875 (*i*), was authorised by the Private Street Works Act, 1892 (*n*): but a register of these charges is required to be kept by the urban authority.

Lis pendens.

With regard to the other matters above referred to (*o*) in enumerating the objects of searches:—Under the Judgments Act, 1839 (*p*), no *lis pendens* shall bind a purchaser or mortgagee without express notice thereof

(*f*) Above, pp. 386, n. (*f*), 518. It is conceived that where the charges are created by order or certificate of the Inclosure Commissioners, Land Commissioners, or Board of Agriculture or other body, given under statutory authority, they are not charged by deed within the meaning of sect. 4 of the Land Charges Act, 1888, though such order or certificate be directed to be made under hand and seal: see above, pp. 519—521.

(*g*) See *R.* v. *Vice-Registrar of Office of Land Registry*, 24 Q. B. D. 178.

(*h*) Above, p. 386, n. (*f*). By stat. 53 & 54 Vict. c. 57, s. 3, a charge under sect. 31 of the Agricultural Holdings (England) Act, 1883, is declared to be a land charge within the meaning of the Land Charges Act of 1888 and required to be registered accordingly.

(*i*) Above, p. 522.

(*k*) Above, pp. 142, 455.

(*l*) Above, p. 386, and n. (*f*).

(*m*) *R.* v. *Vice-Registrar of Office of Land Registry*, 24 Q. B. D. 178.

(*n*) Stat. 55 & 56 Vict. c. 57, s. 13; *Stock* v. *Meakin*, 1900, 1 Ch. 683; above, pp. 142, 455.

(*o*) Above, p. 511.

(*p*) Stats. 2 & 3 Vict. c. 11, s. 7.; 42 & 43 Vict. c. 78; R. S. C. 1883, Order 61; above, p. 512.

unless registered and re-registered every five years in the Office of Land Registry. The purchaser should therefore search the register of pending suits for the last five years to find out if any legal proceedings affecting the property sold are entered therein. And as he will be bound by the result of any action at law or in equity affecting the property sold, which is so registered, or of which, though not so registered, he has *express notice* (*q*), he should, if any such action be proceeding, refuse to complete without the concurrence of all persons asserting therein any apparently well-founded claim on the property. It should be noted, however, that registration or express notice of a *lis pendens* against the vendor is not necessarily notice of an incumbrance on the land sold, for the suit in question may not affect the land (*r*). It is merely notice of a claim, and makes it necessary for the purchaser to inquire into the nature of the claim. And if the claim sought to be enforced be such as would create no charge on the land sold, the purchaser cannot refuse to complete the contract (*s*).

Lands in Lancashire or Durham.

Where the land sold is situate in either of the counties palatine of Lancaster and Durham, the index of pending suits in the Palatine Courts (*t*) must also be searched (*u*).

Bankruptcy.

Searches in bankruptcy are of course made to discover if the title to the lands sold has been affected by reason of their vesting under bankruptcy proceedings against the vendor or some former owner, either in the trustee in the bankruptcy or in the trustee appointed to carry out a composition or scheme of arrangement approved by the Court (*x*). By the Deeds of Arrangement Act,

Deeds of arrangement.

(*q*) Co. Litt. 344 b; *Anon.*, 1 Vern. 318; *Hiern* v. *Mill*, 13 Ves. 114, 120; *Bellamy* v. *Sabine*, 1 De G. & J. 566; *Price* v. *Price*, 35 Ch. D. 297.

(*r*) See above, p. 185.

(*s*) *Bull* v. *Hutchens*, 32 Beav. 615.

(*t*) See Wms. Real Prop. 270 and n. (*p*).

(*u*) Stat. 18 & 19 Vict. c. 15, s. 3.

(*x*) See above, pp. 479—483; stats. 46 & 47 Vict. c. 52, s. 44;

1887 (*y*), any of the following instruments made in respect of the affairs of a debtor for the benefit of his creditors generally (otherwise than in pursuance of the bankruptcy law for the time being in force) shall be void, unless registered in the Central Office of the Supreme Court (*z*) within seven days after the first execution thereof by the debtor or any crediter (*a*), and unless stamped in accordance with the Act; that is to say, an assignment of property, or deed of or agreement for a composition, deed of inspectorship, letter of licence, and any agreement or instrument entered into for the purpose of carrying on, winding up, or disposing of a debtor's business with a view to the payment of his debts. And by the Land Charges Act of 1888 (*b*), every such deed of arrangement, whether made before or after the commencement of that Act, shall be void as against a person becoming after the year 1888 a purchaser for value (*c*) of any land comprised therein or affected thereby, unless registered in the Office of Land Registry. Search in bankruptcy and for deeds of arrangement should never be omitted where it is known or there is reason to suspect that the vendor or any former owner is or has been in embarrassed circumstances (*d*); and having regard to the difficulties occa-

53 & 54 Vict. c. 71, s. 3 (16, 17). An order of adjudication in bankruptcy does not require to be registered in Middlesex in order to pass the lands there situate to the trustee: *Re Calcott and Elvin's Contract*, 1898, 2 Ch. 460.

(*y*) Stat. 50 & 51 Vict. c. 57, amended as to Ireland by 53 & 54 Vict. c. 24; see rule thereunder, W. N. 7 July, 1888.

(*z*) In Ireland the place of registration is the Bills of Sale Office of the King's Bench Division: stat. 50 & 51 Vict. c. 57, s. 8.

(*a*) Others may execute the deed after registration: *Re Batten, Ex parte Milne*, 22 Q. B. D. 685. Instruments executed out of England or Ireland may be posted within one week after execution, and registered within seven days after arrival in the ordinary course of post: see stat. 50 & 51 Vict. c. 57, s. 5.

(*b*) Stat. 51 & 52 Vict. c. 51, ss. 2, 4, 7—9. Such a deed need not, since the passing of the Land Charges Act, 1900, be registered in the Middlesex Registry: stat. 63 & 64 Vict. c. 26, s. 4.

(*c*) Above, p. 513, n. (*m*).

(*d*) See *Cooper* v. *Stephenson*, 16 Jur. 424, 21 L. J. Q. B. 292.

sioned where bankruptcy proceedings have taken place unknown (*e*), it appears desirable to search in bankruptcy on every sale. And the same remark applies to searching for deeds of arrangement. Search for disentailing assurances is only necessary where the title depends on the fact of some estate tail, vested in a person of full age, *not* having been barred. It is only requisite to search for certificates of the acknowledgment of deeds by married women where title is made through some married woman entitled to the land sold at common law, and there is reason to suppose that some disposition, inconsistent with the abstracted title, has been made by her before the year 1883 by deed acknowledged (*f*) and has been suppressed (*g*). Both these searches are now made, as to assurances under the Fines and Recoveries Act, 1833 (*h*), at the Central Office of the Supreme Court (*i*); whilst the records of fines and recoveries are preserved in the Public Record Office (*k*). The object of searching, on the sale of unregistered land, in such of the registers established by the Land Transfer Acts, 1875 and 1897 (*m*), as are open to public inspection, is to discover whether the title to the land sold has been or is about to be registered under those Acts. This may be ascertained at the Office of Land Registry by inspection of the index map and search in the list of pending applications kept there. Such inspection and search should certainly be made on every sale of unregistered land situate in a district where registration of title is compulsory on sale (*n*); and, having regard to the effect of registration under these

Disentailing assurances.

Deeds acknowledged.

(*e*) See the cases cited above, pp. 483, 484, nn. (*u*), (*g*).

(*f*) See stat. 45 & 46 Vict. c. 39, s. 7; Wms. Real Prop. 304 and n. (*e*), 19th ed.

(*g*) 1 Dart, V. & P. 568.

(*h*) Stat. 3 & 4 Will. IV. c. 74.

(*i*) Stat. 42 & 43 Vict. c. 78; R. S. C. 1883, Order 61, r. 9.

(*k*) Established by stat. 1 & 2 Vict. c. 92.

(*m*) Stats. 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65; Land Transfer Rules (1898) 12, 14; Wms. Real Prop. 646, 647, 19th ed.

(*n*) Above, p. 369.

Acts in extinguishing title (*o*), it is no doubt a prudent precaution to take on any sale. But until voluntary registration of title becomes more common than it has hitherto been, the risk practically run in omitting this search will not be great. If it should be found that the title to the land sold has been registered, the purchaser must of course take the steps requisite on a purchase of registered land to acquire a transfer of the estate to himself. The object and necessity of search in the Middlesex and Yorkshire Registries on the purchase of lands situate in those counties sufficiently appears from what has been said above concerning such sales (*q*). The Court Rolls should be searched on the sale of copyholds (*r*) for similar reasons.

Search in Middlesex and Yorkshire Registries.

Copyholds.

It appears, then, that the searches which should usually be made on the purchase of land are the following:—

What searches should usually be made.

1. In the Office of Land Registry for writs and orders affecting land registered or re-registered within the last five years (*s*).

1. Writs and orders affecting land.

2. In the same office for any *lis pendens* registered or re-registered within the last five years (*t*). And where the lands sold are situate in Lancashire or Durham, for *lis pendens* so registered or re-registered in the Lancaster or Durham Court of Chancery (*u*).

2. *Lis pendens.*

3. In the Office of Land Registry for registered life annuities (*x*).

3. Life annuities.

4. If there is reason to suspect that the vendor or some former owner is or has been in embarrassed circumstances, then certainly, but advisably on every sale, for adjudications of bankruptcy,

4. Bankruptcy.

(*o*) See Wms. Real Prop. 622—627, 19th ed.
(*q*) Above, pp. 362 *sq.*
(*r*) Above, p. 348.
(*s*) Above, pp. 511—517.
(*t*) Above, p. 523.
(*u*) Above, p. 524.
(*x*) Above, p. 518.

receiving orders, schemes of arrangement, and compositions under the Bankruptcy Act, 1883 (*y*); and where it is necessary to go back so far, for adjudications or liquidations by arrangement under the Bankruptcy Act, 1869 (*z*), or any previous Bankruptcy Act (*a*), or for insolvency (*b*). These searches are made in the registers kept at the Bankruptcy Court in London (*c*). Receiving orders and adjudications are required to be advertised in the *London Gazette* (*d*).

5. Deeds of arrangement.

5. In the same circumstances, but advisably on every sale, at the Office of Land Registry for deeds of arrangement registered there (*e*).

6. For registration of title.

6. On sale of land situate in a district where registration of title is compulsory on sale, but as a prudent precaution (though perhaps the caution is excessive) on every sale, at the Office of Land Registry in the index map and list of pending applications (*f*).

7. Land charges.

7. On sale of land which is or has within the last twenty-five years been agricultural land (*g*), or may otherwise be subject to some land improvement charge (*h*), in the Office of Land Registry for land charges registered there (*i*), and also, until by the effluxion of time land charges created prior to the year 1889 must have ceased to affect lands, for land charges so created and registered elsewhere (*k*).

8. Middlesex or Yorkshire Register.

8. On purchase of land situate in Middlesex or

(*y*) Above, p. 524.
(*z*) Stat. 32 & 33 Vict. c. 71.
(*a*) See Wms. Pers. Prop. 227, 230, 243, n. (*d*), 15th ed.
(*b*) Ibid. 265; Wms. Real Prop. 272, 19th ed.
(*c*) Elphinstone and Clark on Searches, 98, 100, 101.
(*d*) Stat. 46 & 47 Vict. c. 52, ss. 13, 20 (2), 132.
(*e*) Above, p. 525.
(*f*) Above, p. 526.
(*g*) See above, pp. 142, 518-523.
(*h*) See above, pp. 518—523.
(*i*) Above, pp. 518, 519.
(*k*) Above, pp. 519—521.

Yorkshire, in the county register for any registered assurance affecting the land (*l*).

9. On purchase of copyholds, in the Court Rolls, for any enrolled assurance affecting the land purchased (*m*). 9. Court Rolls.

10. On the purchase of land from a company registered under the Companies Act, 1862, and the Acts amending the same, at the office of the Registrar of Joint Stock Companies in the register established there by the Companies Act, 1900 (*n*), of the mortgages and charges created after that year by any company for the purposes therein mentioned. 10. On purchase of land from a company.

Where a limited company is the vendor the purchaser should also require and make inspection of the company's register of all mortgages and charges specifically affecting its property (*o*). And, as under the Companies Act, 1862 (*p*), where any company is being wound up by the Court or under the supervision of the Court, all dispositions of the company's property made between the commencement of the winding up (*q*) and the order

(*l*) Above, p. 527.

(*m*) Above, p. 527.

(*n*) Stat. 63 & 64 Vict. c. 48, s. 14, whereby every mortgage or charge created by a company after the commencement of the Act (1) for the purpose of securing any issue of debentures, or (2) on uncalled capital of the company, or (3) by an instrument which, if executed by an individual, would require registration as a bill of sale, or (4) as a floating charge on the undertaking or property of the company, shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless registered as therein required within twenty-one days after the date of its creation: see *Re Harrogate Estates, Ltd.*, 1903, 1 Ch. 498.

(*o*) Required to be kept by stat. 25 & 26 Vict. c. 89, s. 43, and open to the inspection of creditors and members of the company only. Non-registration does not avoid the charge: *Wright* v. *Horton*, 12 A. C. 371.

(*p*) Stat. 25 & 26 Vict. c. 89, s. 153.

(*q*) This is, on a winding-up by the Court, the time of the presentation of the petition for winding-up: sect. 85; and on a winding-up under the supervision of the Court, the time of the passing of the resolution authorising the winding-up: sect. 130; *Weston's Case*, L. R. 4 Ch. 20; *Re Dry Docks Corpn.*, 39 Ch. D. 306; *Re West Cumberland Iron Co.*, 40 Ch. D. 361.

for winding-up are void, a purchaser of land from a company should, where there is any reason to suspect the position of the company, search in the *London Gazette* for advertisements of winding-up petitions (*r*).

This exhausts the list of searches, which ought usually to be made; but it will be observed that of these the first three only are unquestionably necessary on every sale; though Nos. 4 and 5 are very desirable and No. 6 is perhaps advisable apart from the special circumstances which make them absolutely requisite. Nos. 7, 8, 9, and 10 need only be undertaken on the purchase of the particular kind of property which can be affected by the registered incumbrances so to be searched for. Search for disentailing assurances or certificates of the acknowledgment of deeds by married women is only necessary in the special circumstances above mentioned (*s*).

Against what names searches should be made.

It is not the practice to direct any search to be made in respect of the above particulars against the names of persons entitled previously to the date of the last purchase deed, as it is assumed that all necessary searches were made on the occasion of the last purchase (*t*). But search should be made against the names of all persons appearing by the abstract to have been entitled to the land sold since the date of the last purchase deed for any estate or interest which might be adversely affected

(*r*) 1 Dart, V. & P. 566.

(*s*) Above, p. 526.

(*t*) On this point the testimony of Mr. Joshua Williams is express: Wms. Real Prop. 357, 1st ed., 465, 13th ed. And the same rule is laid down in Elphinstone & Clark on Searches, 144, 148, 149. Mr. Dart, however, stated that searches in the Middlesex and Yorkshire Registries and in the Court Rolls should extend over the whole period covered by the abstract: 1 Dart, V. & P. 497, 5th ed.; 567, 6th ed. The statement in 1 Dart, V. & P. 560, 6th ed., that it is not the practice to go further back, in searching, than the last *mortgagee* or purchaser for value does not appear in the 5th ed. (p. 560), and is the statement of the editors only. The same statement as to the practice is, however, made in Wolstenholme's Conveyancing and Settled Land Acts, 196, 8th ed.

by any of the incumbrances to be discovered by the search. Thus the search for writs and orders affecting land and *lis pendens* should be made against the names of trustees or mortgagees as well as beneficial owners; for a writ, order, or suit affecting the land sold may well have been issued, made, or instituted against a trustee or mortgagee, although the judgment or Crown debts of a trustee (*u*) or of a mortgagee, who has been paid off (*x*), cannot affect the trust or mortgaged property. The same search should also be made against the names of persons entitled to a general power of appointment over the land sold or to any vested or contingent remainder or any executory interest therein, if the title depend on any exercise or release of the power or any release or conveyance of the remainder or executory interest. For under the Judgments Act, 1838, and the Land Charges Act, 1900, lands over which a man has a general power of appointment may be taken under the writ of *elegit* in execution of a judgment against him, and the judgment is a charge on the lands when the writ or order for enforcing it has been registered (*y*). Under the same Acts (*y*), too, a judgment is a charge on all lands to which the judgment debtor is entitled for any estate or interest at law or in equity, whether in possession, reversion, remainder, or expectancy, so soon as a writ or order for enforcing the same has been registered (*z*). And, although no freehold estate in reversion or remainder, not being merely expectant on a lease for years (*a*), can be taken in execution under a writ of *elegit* (*b*), it appears that an order for the appointment

(*u*) *Finch* v. *Winchilsea*, 1 P. W. 277, 282; *Whitworth* v. *Gaugain*, 1 Ph. 728.

(*x*) Stat. 18 & 19 Vict. c. 15, s. 11; *Greaves* v. *Wilson*, 25 Beav. 434; Wms. Real Prop. 551, 19th ed.

(*y*) Stats. 1 & 2 Vict. c. 110, ss. 11, 13; 63 & 64 Vict. c. 26, s. 2 (1); Wms. Real Prop. 371, 19th ed.

(*z*) See Wms. Real Prop. 407, 19th ed.

(*a*) *Mayor of Poole* v. *Whitt*, 15 M. & W. 571.

(*b*) *Re South*, L. R. 9 Ch. 369; *Hood-Barrs* v. *Cathcart*, 1895, 2 Ch. 411.

of a receiver may be made in respect of such an interest, and that such an order, though not equivalent to actual delivery in execution, may nevertheless be an order made for enforcing the judgment, and so may be sufficient, if duly registered, to give rise to the statutory charge (*c*). This point, however, is open to question and has not yet been decided (*d*), but until it be, it is advisable to make the search suggested. Life annuities are generally searched for against the names of beneficial owners only: though a trustee might also create such charges valid at law, where the trust is not disclosed by the title deeds. It is of course unnecessary to search in bankruptcy against the names of trustees who have no beneficial interest, as their estates are not affected thereby (*e*), but mortgagees' estates are divested on their bankruptcy. Land charges registered under the Land Charges Act, 1888 (*f*), are entered, in the case of freeholds, in the name of the person beneficially entitled to the first estate of freehold at the time of the creation of the land charge, and in the case of copyholds, in the name of the tenant on the Court Rolls at the time of the creation of the charge; and they must be searched for against such names. Land improvement charges created before the year 1889 must be searched for against the name of the landowner at whose instance they were

(*c*) *Re Harrison and Bottomley*, 1899, 1 Ch. 465, 471.

(*d*) The jurisdiction of the Court to make an order for the appointment of a receiver in respect of a judgment debtor's legal or equitable estates in reversion or remainder in land may be supported by the decision in *Tyrrell* v. *Painton*, 1895, 1 Q. B. 202, and the *dicta* of Lindley, M.R., in *Re Harrison and Bottomley*, 1899, 1 Ch. 465, 471, and by the consideration that under the Land Charges Act, 1900, actual delivery in execution is no longer a condition precedent to the attachment of the charge given by sect. 13 of the Judgments Act, 1838; but the principles laid down in *Holmes* v. *Millage*, 1893, 1 Q. B. 551, seem opposed to any such jurisdiction.

(*e*) Stat. 46 & 47 Vict. c. 52, ss. 20, 44, 168.

(*f*) Stat. 51 & 52 Vict. c. 51, s. 10, providing also that where the person, on whose application the land charge was created, was beneficially entitled to a lease for lives or life at a rent or to a term of years, the land charge shall also be registered in the name of that person.

made (*g*); generally the person beneficially entitled in possession to the rents and profits of the land.

No obligation on purchaser to search.

It may be observed that there is no obligation on a purchaser to make or direct any search at all; he owes no duty in this respect to any person interested under an entry in any register, and omission to search is not negligence which will affect him with notice of any matter to be discovered by searching (*h*). But if he do make a search in person or by agent, he will be affected with notice of all entries in the register which affect the land sold, although he may fail to discover them (*i*). It is the duty of the purchaser's solicitor to make on his behalf all searches which in the circumstances of the case are necessary and proper (*k*); and if he omit so to search and the purchaser's title be injuriously affected in consequence, he will be liable to his client in an action of negligence for the damage incurred (*l*).

Search is notice.

Duty of purchaser's solicitor to search.

Official searches.

Under the Conveyancing Act, 1882 (*m*), and the Land Charges Act of 1888 (*n*), official searches may be directed to be made in the registers of *lis pendens*, life annuities, writs and orders affecting land, land charges, deeds of arrangement, and certificates of acknowledgment by married women, and a certificate of the result of the search filed. Such a certificate, according to the tenour thereof, is conclusive, affirmatively or negatively,

(*g*) See the Acts cited above, pp. 518—523; Elphinstone & Clark on Searches, 109 *sq.*

(*h*) *Lane* v. *Jackson*, 20 Beav. 535.

(*i*) *Procter* v. *Cooper*, 2 Drew. 1, 18 Jur. 444; affirmed, 1 Jur. N. S. 149. Having regard to the provisions of stat. 45 & 46 Vict. c. 39, s. 2 (3), stated below, as to the certificate of the result of an official search being conclusive, negatively, it seems that a purchaser will not, by merely directing an official search to be made, be affected with notice of any entries not appearing in the certificate.

(*k*) See above, pp. 527—530.

(*l*) *Cooper* v. *Stephenson*, 16 Jur. 424, 21 L. J. Q. B. 292; Sug. V. & P. 547; Elphinstone & Clark on Searches, 4, 5; 1 Dart, V. & P. 562, 563.

(*m*) Stat. 45 & 46 Vict. c. 39, s. 2.

(*n*) Stat. 51 & 52 Vict. c. 51, s. 17.

as the case may be, in favour of a purchaser as against persons interested under the matters or documents, which are the subject of registration; an office copy is evidence of the certificate; and solicitors obtaining an office copy of such a certificate, and any trustees, executors, agents or other persons in a fiduciary position for whom they are so acting, are not answerable in respect of any loss that may arise from any error in the certificate (*o*). These advantages are not obtainable on private searches, which may still be made. The utility of official searches has, however, been doubted by the learned authors of the treatise on searches (*p*), who maintain that the certificate of the result of an official search can only be evidence, negatively, that no entry of any of the matters searched for is made against the name of the person therein mentioned by the description applied to him in the requisition for search, and does not exclude the possibility of the existence of other entries against that person by the same name but under a different address or description. It appears, however, that this contention is not quite correct. The Conveyancing Act, 1882, provides that the certificate shall be conclusive according to *its* tenour (*q*), not according to the tenour of the requisition for search. It is true that by the rules made under that Act (*r*) any one directing an official search to be made against a particular name is required to state the usual or last known place of abode as well as the title, trade or profession of the person bearing that name. But according to the forms prescribed by these rules, the search is directed to be made against the *name* mentioned in the requisition, and the certificate is of the result of a search against the name specified in the certificate. By the practice of the

(*o*) See the two previous notes.

(*p*) Elphinstone & Clark on Searches, 166—168.

(*q*) Above, p. 533.

(*r*) See Wms. Conv. Stat. 479 *sq.*; Wolstenholme's Conveyancing and Settled Land Acts, 159 *sq.*, 8th ed.

office, too, the certificate of the result of the search does not necessarily specify the address and description of the person against whose name the search was made. If no entry, or none but those specified in the certificate, were found against any person of that *name*, the fact is so stated in the certificate, without adding the address and description contained in the requisition for search; and in such case the certificate certainly has a value unobtainable by a private search. If entries are found against the same name but coupled with a different address and description, the certificate then states that no entries, or none but the entries specified therein, have been found against the name, address and description contained in the requisition for search. This form of certificate shows that there are entries against the same name but coupled with an entirely different address and description, and is a warning that further search may be necessary. If, however, entries are found against the name specified in the requisition for search, but coupled with an address and description which, though not identical with those contained in the requisition, render it probable that the person so described is the same as that mentioned in the requisition, then a note is made in the schedule to the certificate, of the entries against the person so described. And if the identity of the person be certain, as it would be in the case of a peer, though the address be different, all the entries against the name are included in the schedule to the certificate (*s*). It appears, therefore, that a certificate of the result of an official search has a greater value than is allowed by the learned authors of the treatise on searches; and it seems that in general the best course to take is to direct an official, instead of making a private search. When this course is adopted, the purchaser

(*s*) The writer is indebted for this information to the courtesy of the officials in the Land Charges Department of the Office of Land Registry.

obtains in the certificate a valuable document of title, and the purchaser's solicitor is relieved from the liability which he would incur if he or one of his clerks searched the register but failed to discover a material entry.

Official searches for disentailing deeds and in the Yorkshire and Middlesex Registries.

Official searches may also be directed to be made in the index of enrolled disentailing deeds (*t*), in the Yorkshire Registries (*u*), and in the index of assurances registered in the Middlesex Registry (*x*). The certificate of the result of any such search has no effect as against any person interested under any entry duly made, but not disclosed by the certificate (*y*); but in the case of the Middlesex (*x*) and Yorkshire (*u*) Registries, solicitors directing an official search, and any persons in a fiduciary position for whom they are acting, are protected against liability for any loss that may arise in consequence of an error in the certificate. It appears, therefore, that in these cases also, the best course for the purchaser's solicitor to take is to direct an official search. It may be remarked that an official search must necessarily be made by a person familiar with the register or index of which he is in charge, and experienced in searching for entries therein; but a solicitor may not always be able to entrust a private search to a clerk experienced in such matters.

Inquiries to be made before completion.

Besides making the above-mentioned searches (*z*), the purchaser should, where the property sold is likely to be subject to any statutory charge of the kind held *not* to be a land charge within the meaning of the Land Charges Act of 1888 (*a*), such as a charge for a proportion of the expenses incurred by a local authority in

(*t*) R. S. C. 1883, Order 61, r. 23.

(*u*) Stat. 47 & 48 Vict. c. 54, ss. 20—23, 31.

(*x*) Land Registry (Middlesex Deeds) Rules, 1892, Nos. 9—14; W. N. 13th Feb. 1892.

(*y*) See stat. 45 & 46 Vict. c. 39, s. 2 (1, 11); Wms. Conv. Stat. 273, 274.

(*z*) Above, pp. 527—530.

(*a*) Above, pp. 142, 455, 522, 523.

sewering, paving or lighting an adjoining street, inquire of the vendor whether the property is or will become subject to any such charge, and also if he has notice or knowledge of any fact (such as a demand made, notice served, or resolution passed by the local authority requiring the execution of any street or other works) which will subject the property sold to a charge of this kind at any future time. This inquiry is usually appended to the requisitions on title (*b*): but as such a liability may arise after they have been delivered, and should be discharged by the vendor as an outgoing if incurred before the time fixed for completion (*c*), it is prudent, where there is a likelihood or possibility of any such liability, to repeat this inquiry just before completion, and also to make inquiry of others, as of neighbours or of the local authority (*d*). As we have seen (*e*), a

(*b*) Above, p. 142.

(*c*) Above, pp. 454—456.

(*d*) See *Re Leyland and Taylor's Contract*, 1900, 2 Ch. 625, where a purchaser, who completed his contract without making such inquiries, was held not to be entitled to compensation, under a condition providing that compensation should be allowed for any omission in the particulars, by reason of the vendor having omitted, without fraudulent intent, to disclose that such a notice as above mentioned had been served on him before the date of the contract for sale, no liability under such notice having been actually incurred before completion. It was pointed out, however, by Rigby, L. J. (p. 632), that, if the purchaser had not completed the contract, he might perhaps have relied upon such omission as a ground for resisting the specific performance or claiming the rescission of the contract. See also *Hampstead Corpn.* v. *Caunt*, 1903, 2 K. B. 1. *Quære* whether it is not an objection to the title if the property sold be subject to a prospective liability of this kind, although no charge will actually arise before completion. Is a contract to sell land free from incumbrances satisfied by showing a title subject to such prospective liability? It was considered in the case cited that the general liability to be affected by any such fact as above mentioned is an incident of property (like taxation) to which a purchaser must necessarily become subject. This seems a good reason for holding that the purchaser must discharge any such prospective liability, where it was created after the sale and the expense became payable after the time for completion: see above, p. 453. But where a certain prospective liability has been created before the sale, as by the passing of a resolution under sect. 6 of the Private Street Works Act, 1892, to execute some works thereby authorised, is not its existence an objection to the title? A prospective charge of succession duty certainly is so; above, p. 217.

(*e*) Above, p. 456.

purchaser may be able to insist on such a liability being discharged as a condition precedent to completion in cases where he might have some difficulty in recovering the amount thereof from the vendor if paid by himself after completion. And generally the purchaser should ascertain, before he completes the purchase, that all outgoings payable by the vendor, whether for rates, taxes, rent or any other matters that might subject the purchaser to any liability for their payment (*f*), have been duly discharged. If the property sold include a house having water, gas or electric light laid on, the purchaser should ascertain that the water rate or other charges payable by the vendor have been duly paid or that non-payment thereof will not subject him to any liability (*g*).

As to discharge of outgoings payable by the vendor.

Ascertaining that possession is in accordance with the title.

Inquiry of tenants and occupiers as to their interest.

The purchaser must further ascertain that the possession or enjoyment of the land sold is in accordance with the title shown. For this purpose he should make inquiries of all tenants or occupiers of the property sold or any part thereof as to the nature and extent of their interest therein. For if he have notice of a tenancy of any part of the property, he will be affected with notice of all rights or equities of the tenant against the vendor with regard not only to the lease (*h*), but also to all collateral matters (*i*); as, for instance, if the tenant should have an agreement or option to purchase the demised premises (*k*), or the timber growing thereon (*l*), or if the property sold belonged in equity to a partnership firm, of which the

(*f*) Above, p. 454.

(*g*) See *Sheffield Waterworks Co.* v. *Wilkinson*, 4 C. P. D 410, 422, 424; *East London Waterworks Co.* v. *Kellerman*, 1892, 2 Q. B. 72; *Gas Light and Coke Co.* v. *Cannon Brewery Co.*, 1903, 1 K. B. 593.

(*h*) See *Caballero* v. *Henty*, L. R. 9 Ch. 447, 449.

(*i*) *Barnhart* v. *Greenshields*, 9 Moore, P. C. 18, 32; *Hunt* v. *Luck*, 1901, 1 Ch. 45, 49, 1902, 1 Ch. 428, 432.

(*k*) *Daniels* v. *Davidson*, 16 Ves. 249, 17 Ves. 433.

(*l*) *Allen* v. *Anthony*, 1 Mer. 282.

vendor was a member (*m*), and were in the occupation of the firm (*n*). So actual knowledge that the rents are paid to some person, whose title is inconsistent with the vendor's, is constructive notice of that person's rights: but mere knowledge that the rents are paid to an estate agent does not affect the purchaser with any notice or put him upon inquiry (*o*). As we have seen (*p*), where the property sold is a reversion expectant on a leasehold interest yielding rent, the purchaser should ascertain that the tenant is paying his rent to the vendor. And where land is sold with vacant possession to be given on completion of the purchase, the purchaser should ascertain that the vendor himself, or some person who makes no claim adverse to the vendor's title and will undertake to give up possession according to the contract of sale, is in occupation thereof (*q*). As has been already mentioned (*r*), it is possible that a person may be in possession of the property sold by virtue of a writ of *elegit* actually executed but not registered, or that a tenant may be paying his rent to a receiver appointed under an unregistered order made by way of equitable execution; and in such cases the purchaser may be bound by the writ or order if he have notice of it. The purchaser should also carefully inspect the whole of the property sold and have it surveyed prior to completion, and should make inquiry of the tenants or occupiers with respect to the boundaries or other matters regarding the physical condition of the property. For if by reason of any material defect of quantity or otherwise the property sold do not correspond with the description of it given in the contract,

Inspection and survey of the property.

(*m*) See above, p. 409.

(*n*) *Cavander* v. *Bulteel*, L. R. 9 Ch. 79.

(*o*) *Hunt* v. *Luck*, 1901, 1 Ch. 45, 1902, 1 Ch. 428.

(*p*) Above, pp. 377, 378.

(*q*) As to the duty of the vendor to give up vacant possession on completion, see above, pp. 446, 449, 509; *Engell* v. *Fitch*, L. R. 4 Q. B. 659; *Royal Bristol, &c. Society* v. *Bomash*, 35 Ch. D. 390.

(*r*) Above, p. 515.

or in any representation which induced the purchaser to made the contract, and the error be caused by the innocent misrepresentation of the vendor and not by fraud, the purchaser will be entitled to resist the specific performance of or to rescind the contract, while it remains uncompleted (*s*): but when the contract has been fully performed, the purchaser will not be entitled to any relief in respect thereof (*t*), except (1) by virtue of an express agreement contained in the contract to make compensation for such errors (*u*), or (2) if the defect be really a defect of title and compensation be recoverable under the covenants for title contained in the conveyance (*x*), or (3) if the representation amounted to a warranty, collateral to the contract for sale, of the truth of the fact stated (*y*). Here it may be mentioned that if a man buy land without inspecting it, he does so at his own risk and must accept without compensation any defects in the physical condition of the property which are patent to any one who views it and are not inconsistent with the description contained in the contract for sale; as where a meadow sold is obviously crossed by a public footpath (*z*), or a house sold is plainly out of repair (*a*). But a man may decline to perform the contract on account of defects which are latent, or not discoverable by inspection, if they interfere materially with the enjoyment promised to him by the contract; as where a pathway across a field adjoining a private dwelling-house is subject to an easement of way, not disclosed by the contract, in favour

Purchaser buying without inspection must accept patent, but not latent defects.

(*s*) Above, p. 537, and n. (*d*); *Jacobs* v. *Revell*, 1900, 2 Ch. 858; *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258.

(*t*) *Wilde* v. *Gibson*, 1 H. L. C. 605, 632, 633; *Joliffe* v. *Baker*, 11 Q. B. D. 255; above, pp. 55, 537, n. (*d*).

(*u*) *Palmer* v. *Johnson*, 13 Q. B. D. 351; above, p. 55; see *Debenham* v. *Sawbridge*, 1901, 2 Ch. 98.

(*x*) *May* v. *Platt*, 1900, 1 Ch. 616; and see *Debenham* v. *Sawbridge*, ubi sup.

(*y*) *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215.

(*z*) *Bowles* v. *Round*, 5 Ves. 508.

(*a*) *Grant* v. *Munt*, G. Coop. 173, 177; *Keates* v. *Cadogan*, 10 C. B. 591; *Cook* v. *Waugh*, 2 Giff. 201.

of an adjoining landowner (*b*); and this is the case whether the purchaser actually inspect the property sold or not, and notwithstanding that the contract provide that, the property being open to inspection, the purchaser shall be deemed to buy with full knowledge of the actual quantities and condition thereof (*c*). Such a stipulation may, however, in some cases prevent the purchaser from raising objections to defects discoverable by a careful survey, though not by a mere casual view of the property (*d*). As we have seen (*e*), if a man buy land with notice that a good title cannot or will not be made in some particular, he is precluded from objecting in this respect to the title shown, unless the vendor have by the contract of sale expressly agreed to make a good title. This doctrine may prevent a purchaser buying land with notice of physical defects, which would otherwise constitute a ground for refusing to perform the contract, from objecting to the title on that account; and may also preclude him from avoiding the contract, where the vendor has made an innocent misrepresentation as to the property sold, but the purchaser bought with notice of the true state of the facts (*f*).

§ 3.—*Of the Preparation of the Conveyance.*

Preparation of the conveyance.

As we have seen (*g*), it is the purchaser's duty at his own expense to prepare a proper instrument of conveyance to himself of the property sold and to tender the same to the vendor for his execution; the vendor is bound to execute this instrument at his own expense; and where other persons than himself are necessary

(*b*) *Ashburner* v. *Sewell*, 1891, 3 Ch. 405; see above, pp. 61, n. (*w*), 141, 537, and n. (*d*).

(*c*) *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258.

(*d*) *Re Terry and White's Contract*, 32 Ch. D. 14, 23.

(*e*) Above, pp. 164, 354.

(*f*) See *Farebrother* v. *Gibson*, 1 De G. & J. 602; *Leyland* v. *Illingworth*, 2 De G. F. & J. 248.

(*g*) Above, pp. 28, 29, 37, 38, 56, 61, n. (*x*).

parties thereto, in order to convey to the purchaser the whole estate contracted for, he is bound, in the absence of stipulation to the contrary, to procure them to execute the same at his own expense. What persons are necessary parties to the conveyance will have been ascertained on the investigation of title. Every person in whom is vested any portion of the legal and equitable estate contracted for in the land sold, or any interest therein, must concur in the conveyance to the purchaser, unless his interest be such that it will be conveyed or defeated by the execution of some paramount trust or power intended to be exercised by the instrument of conveyance. Thus, where an unincumbered estate in fee simple is sold, all persons entitled for a vested estate either for life, in tail, or in fee, and either in possession or in remainder, to the whole or any fraction of the freehold in fee, all persons entitled to any contingent or executory interest which will or may displace or defeat any present vested estate, all mortgagees, portioners, jointresses and doweresses, all persons entitled to any term of years, continuing tenancy, rent-charge, *profit à prendre* or easement, and all persons interested in the property sold under any trust or equity of or by which the purchaser has notice or is bound (*h*), are necessary parties to the conveyance (*i*); unless the assurance to the purchaser is to be effected, for example, by the exercise of a power of appointment operating under the Statute of Uses or created by will, of a statutory power, such as that given by the Settled Land Act, 1882 (*k*), or of a trust for or power of sale on the part of trustees having the legal estate (*l*). And where the conveyance is to be carried out by virtue of an authority paramount to the estate or interest of some person entitled, who is not, therefore, to be made a party thereto, care must be taken

Who are necessary parties to the conveyance.

(*h*) Above, pp. 135, 249 *sq.*

(*i*) See Wms. Real Prop. 452, 453 and elsewhere, 13th ed.; 575, 576 and elsewhere, 19th ed.

(*k*) Above, p. 313.

(*l*) Above, p. 268.

that all persons, whose estates or interests are not bound by the execution of the authority, shall concur to convey the same. Thus we have seen that on a sale under the powers given by the Settled Land Acts, there may be various estates and interests, which will not be displaced or defeated by the conveyance of the tenant for life (*m*); and the owners of all such estates and interests, as paramount mortgagees, assignees for value of the tenant for life (unless by some separate document they consent to the exercise of the tenant for life's power), and as the writer thinks, mortgagees of any remainderman's estate, must be required to assure by their own conveyance their estates or interests to the purchaser. So also, where the purchaser has bought at a sale made by order of a Court of Equity, he need not require the concurrence in the conveyance of any persons having *equitable* estates or interests, which are bound by the order for sale: but he must obtain a conveyance of the interests of all persons entitled to the *legal* estate in the property, or to any equitable estate or interest therein *not* bound by the order (*n*). Where the title to any land sold is such that intermediate trustees are interposed between trustees seised or possessed of the legal estate and the persons beneficially entitled, as where land has been assured to the use of A. in fee on trust for B., who is a trustee for C., the intermediate trustees are not necessary parties to the conveyance of the land, which may well be made by the trustees holding the legal estate and the persons beneficially entitled (*o*). The intermediate trustees, however, may possibly have acquired a lien on the land for their costs or expenses, so that their concurrence may, it seems, be required by a purchaser in order to release or acknowledge the non-existence of any such lien. And if it be proposed in

Intermediate trustees.

(*m*) Above, pp. 314, 323 *sq.*
(*n*) Above, p. 414.
(*o*) See *Head* v. *Teynham*, 1 Cox, 57; —— v. *Walford*, 4 Russ. 372; *Grainge* v. *Wilberforce*, 5 Times L. R. 436.

such cases to dispense with their concurrence, inquiry should be made of them if they claim any such lien.

Incapacity of any party to the conveyance.

Here we may notice that if any necessary party to the conveyance be under any incapacity, such as that of infancy, coverture on the part of a woman, or lunacy, all due steps must be taken to secure the proper assurance of his or her estate to the purchaser, either by vesting order (*q*), concurrence of the husband and acknowledgment of the deed in the case of a married woman not entitled to the land as her separate property, or otherwise.

Parties to the conveyance on the grantee's side.

On the side of the grantee or grantees under the conveyance, the purchaser himself is in general the only necessary party. But as we have seen (*r*), the vendor's obligation is to execute a conveyance of the land sold to the purchaser, or as he shall direct. The purchaser is therefore entitled to require the conveyance to be made to some other person or persons than himself, or to himself and others, and for such estates and interests as he shall direct; and the vendor is bound to assure the lands sold accordingly. It appears that in such case the vendor may in general demand that the purchaser, with whom alone he has contracted, shall be made a party to the conveyance in order to testify that he has directed the conveyance to be made to a stranger to the contract and that the vendor has duly performed his part of the contract by complying with this direction (*s*). But if the purchaser should have made an absolute assignment of all his interest in the contract, and the assignee have given notice of the assignment

Conveyance to the purchaser's nominee.

(*q*) Above, pp. 469, 493.

(*r*) Above, p. 37.

(*s*) This appears to follow from the fact that, if the purchaser's assignee seek to enforce the specific performance of the contract by the vendor, the purchaser should be made a party to the action (above, p. 499), and would be a proper party to a conveyance ordered in such action.

and be willing to take upon himself the whole burden of the original contract and prove his title by assignment from the purchaser, then it seems that the vendor ought to complete the contract with the assignee alone, without requiring any further concurrence of the purchaser (*t*). In this event, however, it is thought that the assignee could not insist on the vendor executing a conveyance which took no notice of the original contract and the assignment; for the vendor would be entitled to have the payment and receipt of the original price mentioned, and could not be made to accept any recital or statement alleging, contrary to the truth, that he had contracted with the assignee for the sale of the land (*v*). If the purchaser before completion re-sell the land to another, it is to the sub-purchaser's interest to obtain a conveyance direct from the vendor and taking no notice of the original contract, as this will prevent the raising in the future of any question whether the original purchaser incumbered his interest before the re-sale and the sub-purchaser had notice thereof. Where there is no increase of price on the re-sale, the vendor may well agree to this if the original purchaser sign a memorandum authorising him to convey the land direct to and to receive payment of the price from the sub-purchaser (*x*). But if the purchaser re-sell at an increased price, he must be a party to the conveyance in order to acknowledge the receipt of his profit on the transaction (*y*); for the sub-purchaser is only entitled to a conveyance on payment of the price fixed by the re-sale to the person entitled to receive it (*z*), and cannot of course require the vendor to accept the whole of this and pay over part of it to the original purchaser. And the price fixed by the re-sale must be stated in the con-

(*t*) Above, pp. 499—501.

(*v*) *Hartley* v. *Burton*, L. R. 3 Ch. 365.

(*x*) See 1 Dart, V. & P. 581. The memorandum should be in duplicate, one part being given to the sub-purchaser.

(*y*) See Davidson, Prec. Conv. vol. ii. pt. i. 319, 4th ed.

(*z*) Above, p. 509.

veyance, as it is on that price that the stamp duty is payable (*a*).

Form of the conveyance.

Subject to the question discussed below (*b*), whether outstanding estates or incumbrances should be got in by deeds separate from the conveyance, the conveyance of the property sold will, as a rule, be effected by one deed. But it is for the purchaser to decide in what form he will take his conveyance, provided that the burden laid on the vendor, in respect of expense and otherwise, be not materially increased by the purchaser's choice (*c*). Thus, where properties of different kinds or held under different titles are sold by one contract, the purchaser may require the same to be conveyed by separate assurances and apportion the purchase money as he may think fit (*d*). For example, where freeholds and copyholds are sold together, the conveyance cannot of course be effected by one deed, the copyholds requiring to be assured by surrender and admittance. So where freeholds and leaseholds are included in one contract of sale, the purchaser may require that his title to the freeholds shall not be incumbered with the assignment of the leaseholds, and as to the leaseholds themselves, that his title under one lease shall not be complicated with the assurance of land held under another. And where lands sold together lie far apart, as in different counties not adjoining each other, he may demand that they shall be assured by separate deeds. But it is questionable whether the vendor can be compelled, in the absence of special stipulation, to execute a great number of separate conveyances in different parcels of a lot of land lying near together and sold by one contract; for that would sensibly increase the vendor's trouble of perusing

(*a*) Stat. 54 & 55 Vict. c. 39, s. 58 (4), (5).

(*b*) P. 547.

(*c*) See *Clark* v. *May*, 16 Beav. 273; *Cooper* v. *Cartwright*, John. 679, 685; *Egmont* v. *Smith*, 6 Ch. D. 469, 474.

(*d*) *Clark* v. *May*, 16 Beav. 273.

and executing the assurance completing the contract; and in any case he could only be required to do so on the terms of being paid the extra expense so occasioned, and also, it is thought, on condition that he were not asked to assure lands accurately described as one entire property in the contract by several new descriptions of the particular parts thereof (*e*). If a purchaser desire to take a conveyance in lots of lands offered to him for purchase by private contract as one entire estate, he should certainly insert an express stipulation to that effect in the contract (*f*).

Sale of lands subject to incumbrances.

Where the whole estate in the land sold is not vested in the vendor, as where it is subject to mortgages or other charges or incumbrances, which have to be paid off, discharged, or released, to enable the vendor to convey such an estate as he contracted to sell (*g*), it appears that, if by the contract the vendor purported to sell the whole estate as vested in himself without disclosing the state of the title, and in the absence of any stipulation to the contrary, the purchaser is in strict right entitled to require the vendor at his own expense to get in all the outstanding estates and interests and

(*e*) See Sug. V. & P. 559; 1 Dart, V. & P. 573. It is submitted that the *dictum* of Jessel, M. R., in *Egmont* v. *Smith*, 6 Ch. D. 469, 474, that in no case can a vendor object to convey the sold property in parcels on receiving the whole purchase money, and on being paid the additional expense, is not correct. The vendor's obligation is to convey the land which he has contracted to sell. What that land is, is shown by the description thereof contained in the contract for sale. If the vendor has shown a good title, that is, has proved his right to convey what he contracted to sell, including the identity of the land described in the contract with that described in the title deeds, *and with that of which possession is offered* (above, pp. 36, 75), it appears that the vendor cannot be obliged to convey and to covenant for title by other descriptions than those under which he sold. But lands sold as one entire property can seldom be conveyed in lots without a number of new descriptions. This consideration alone, it is submitted, exhibits the inaccuracy of the late M. R.'s *dictum*. Besides, it takes no account of the increased trouble, apart from the extra expense, which may be laid on the vendor.

(*f*) Note that such a stipulation was actually made, in the case of *Egmont* v. *Smith*, ubi sup.

(*g*) Above, pp. 75, 130.

vest them in himself or in a trustee for himself, in order that the conveyance to the purchaser may be one simple deed of assurance from the vendor, or from him and his trustee, to the purchaser (*h*). But it has never been the practice to insist on this right, except in circumstances of extreme complication (*i*); and, as we shall see, it is not to the purchaser's interest to allow the legal estate to be conveyed to the vendor, where the land sold is heavily incumbered; so in most cases the conveyance is taken by one deed, to which the incumbrancers, as well as the vendor, are parties. If, however, by reason of the number of estates or interests outstanding in persons, who were not parties to the contract of sale, the expense of preparing the instrument of conveyance is sensibly increased, the purchaser is entitled to require the vendor to bear the extra expense so occasioned (*k*): though where the contract shows that the property is subject to charges or incumbrances, which must be released in order to make a good title, it does not appear that the vendor is liable to contribute to the cost of preparing the conveyance (*l*). As we have seen (*m*), it is and has long been the practice to stipulate expressly in conditions of sale by auction that the vendor and all other necessary parties, if any, shall execute a proper assurance of the property to the purchaser; and that the purchaser shall bear the expense of preparing, making and doing, not only this assurance, but also every other assurance and act, if any, which shall be required by the purchaser for getting in, surrendering or releasing any outstanding estate, right, title or interest, or for completing or perfecting the vendor's title, or for any other purpose. It

The usual stipulation as to the costs of conveyance.

(*h*) Sug. V. & P. 557; 2 Dart, V. & P. 814; see *Reeves* v. *Gill*, 1 Beav. 375, and the comments thereon in Sug. V. & P. 558.

(*i*) Sug. V. & P. 557; and see *Jones* v. *Lewis*, 1 De G. & S. 245.

(*k*) Sug. V. & P. 558; 2 Dart, V. & P. 814; see *Jones* v. *Lewis*, 1 De G. & S. 245.

(*l*) Sug. V. & P. 558.

(*m*) Above, pp. 56, 61.

has been decided that, where the purchaser expressly undertakes, in words as wide as these, to bear the expense of preparing, *making and doing* every assurance *and act* necessary to get in any outstanding estate or perfect the vendor's title, he is bound to pay the whole expense of the concurrence in the conveyance to him of the vendor's mortgagees (*n*), or of the execution of a deed of confirmation rendered necessary because of the imperfect execution of the conveyance to the vendor himself (*o*). But the understanding of the profession is that a condition of sale in the above form is not intended to throw upon the purchaser the expense of the perusal on behalf of and execution by the vendor himself of the conveyance of the property sold (*p*)—an expense for which the vendor is liable in absence of express stipulation to the contrary (*q*)—and the practice is for the vendor to bear this expense himself, although the contract contain this condition.

Discharge of incumbrances on sale by payment into Court.

Under the Conveyancing Act of 1881 (*r*), upon the sale, either by the Court (*s*) or out of Court (*t*), of land subject to any incumbrance (including any mortgage, lien or charge of a portion or annuity or other capital or annual sum, whether immediately payable or not), the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court of a sum of money sufficient to provide for the amount

(*n*) *Re Willett and Argenti*, 60 L. T. 735, explained and distinguished in *Re Sander and Walford's Contract*, 83 L. T. 316; 1900, W. N. 183. *Re Willett and Argenti* appears to have given to the usual condition of sale a greater effect than it was previously supposed to have: see Davidson, Prec. Conv. vol. i. p. 612, 4th ed.

(*o*) *Re Woods and Lewis's Contract*, 1898, 1 Ch. 433, 437, affirmed, 1898, 2 Ch. 211.

(*p*) It should be noted, however, that, according to this form, the purchaser does literally undertake to bear the expense of *making* the assurance to himself.

(*q*) Sug. V. & P. 561; 2 Dart, V. & P. 798.

(*r*) Stat. 44 & 45 Vict. c. 41, s. 5; see s. 2 (viii.).

(*s*) See *Patching* v. *Bull*, 30 W. R. 244; *Dickin* v. *Dickin*, ib. 887.

(*t*) See *Milford, &c. Co.* v. *Mowatt*, 28 Ch. D. 402.

charged on the land and future costs, expenses and interest (*u*); and the Court may, if it thinks fit, and either after or without notice to the incumbrancer, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale. This enables a vendor to procure land, which is subject to mortgages or charges, to be conveyed to the purchaser for an unincumbered estate without the concurrence of the incumbrancers. But it appears that the Court will not oblige the vendor, at the purchaser's instance, to adopt this mode of conveying an unincumbered estate, where such a course would involve hardship, as where the amount required to be paid into Court would greatly exceed the purchase money (*x*).

Vendor should never be allowed to obtain the legal estate.

It should be noted, in connexion with the release of incumbrances, that, where the legal estate is outstanding in mortgagees or trustees, the purchaser should never require or allow the vendor to take a reconveyance or conveyance thereof to himself before completing the purchase (*y*). The reason of this is that, if the vendor should, while he was entitled to the equity of redemption or other equitable estate in the lands, have executed a conveyance by way of mortgage or otherwise and containing a precise recital, if the lands were thereby assured for an estate in fee simple in possession, that he was seised of them in fee, or in other cases that he was entitled to the legal estate therein, then he and all persons claiming under him would be estopped from denying that he was so seised, or entitled. It would follow that upon the reconveyance or conveyance of

(*u*) For the purpose of deciding what sum ought so to be paid into Court, the Court will make a declaration as to future rights: *Re Freme's Contract*, 1895, 2 Ch. 256, 778, 780.

(*x*) *Re Great Northern Rail. Co. and Sanderson*, 25 Ch. D. 788.

(*y*) See *General Finance, &c. Co.* v. *Liberator, &c. Socy.*, 10 Ch. D. 15, 20.

the legal estate to the vendor, the same would in effect pass at once to the persons entitled under the mesne conveyance. As against those persons, the purchaser, claiming by a subsequent conveyance from the vendor, would be subject to the same estoppel, and would be precluded from alleging that the mesne conveyance passed an equitable estate only, and that he himself held the legal estate as a purchaser for value without notice of the mesne conveyance (*z*). The purchaser would thus be affected by mesne incumbrances created by the vendor, which he might have avoided if he had not allowed the vendor to obtain the legal estate. The right course, therefore, for the purchaser to take is to require that any legal estate outstanding in mortgagees or trustees shall be conveyed by them to him, or to a trustee for him, direct. He will then be able to rely on the doctrine of purchase of the legal estate for value and without notice, if the vendor should have created intermediate equitable incumbrances, of which the purchaser knew nothing (*a*). It is thought that, as the vendor is in equity a trustee for the purchaser of the land sold from the date of the contract for sale (*b*), and as the purchaser is entitled to restrain any disposition of the legal estate about to be made to his prejudice by the vendor pending completion (*c*), and is entitled to take his conveyance in what

(*z*) An ambiguous recital not precisely averring (in the case of freeholds) the vendor's legal seisin would not have the same effect; for instance, a recital that he was seised of or otherwise well entitled to the lands, for he might well be entitled in equity though not at law. Neither would any such estoppel result from a mere conveyance of lands, without any recitals, by lease and release or grant; for these are innocent conveyances, passing only the assuror's actual estate or interest, if any. Nor would any such estoppel arise from the fact of the vendor having entered into express or the statutory covenants for title. See *Bensley* v. *Burdon*, 2 S. & S. 519, 8 L. J. Ch. 85; *Right* d. *Jefferys* v. *Bucknell*, 2 B. & Ad. 278; *Doe* d. *Gaisford* v. *Stone*, 3 C. B. 176; *Heath* v. *Crealock*, L. R. 10 Ch. 22; *General Finance, &c. Co.* v. *Liberator, &c. Soc.*, 10 Ch. D. 15; *Onward, &c. Soc.* v. *Smithson*, 1893, 1 Ch. 1.

(*a*) Above, pp. 496—499.

(*b*) Above, pp. 438 *sq.*, 446.

(*c*) Above, p. 452.

form he pleases and to keep alive any mortgage for his own benefit, if he desire to do so (*d*), the purchaser is entitled to insist that any outstanding legal estate shall be conveyed direct to himself, or to a trustee for him, and shall not, pending completion, be got in by and assured to the vendor.

Purchase followed by an immediate mortgage.

It constantly happens that a purchaser completes the sale with the assistance of some other person, who advances part of the purchase money and takes a mortgage of the lands sold to secure the repayment of his loan. In such cases it is a common practice for the whole estate in the lands purchased to be conveyed to the purchaser, and to be mortgaged by him to the lender by a deed executed immediately after the execution of the conveyance, the conveyance and the other title deeds being transferred directly from the vendor's into the new mortgagee's custody. It was pronounced by a late learned judge (*e*), that if in a case like this the property sold were in mortgage at the time of the sale, the new mortgagee should never allow the legal estate to get into the purchaser's hands. There is no doubt that it is always preferable for an intending purchaser or mortgagee of lands, which are already in mortgage, to take a conveyance of the legal estate direct from the former mortgagee, as that secures the same priority over mesne incumbrances as the former mortgagee had. But in the case of a purchase followed immediately by a mortgage, the risk run by the new mortgagee allowing the legal estate to be conveyed to the *purchaser* is very different from and far less than that incurred by a purchaser allowing an outstanding legal estate to be got in by the *vendor*. In the latter case the vendor has presumably been in possession of the

(*d*) *Cooper* v. *Cartwright*, Joh. 679, 685.

(*e*) Jessel, M. R., *General Finance, &c. Co.* v. *Liberator, &c. Socy.*, 10 Ch. D. 15, 20.

land, and has had both the right and the opportunity of creating mesne incumbrances. In the former instance the purchaser has never been in possession either of the land or of the title deeds; and it is only by fraud that he can have executed, prior to the new mortgage, such a conveyance as would estop the new mortgagee from claiming the legal estate. A fraudulent mortgage of this kind, induced by false title deeds, was in fact made by an intending purchaser of land in the case, which called forth the learned judge's remarks: but as the mortgage deed contained no recitals at all, there was no estoppel as against the mortgagee from the purchaser. He suffered, however, the inconvenience of defending an action brought against him by the prior mortgagee. This shows that the only quite safe course is to follow the learned judge's advice. But the common practice is still pursued in many such cases, partly on account of its convenience, and partly because the only risk run is that of fraud, which is an exceptional occurrence.

Purchaser receiving notice of mesne incumbrances.

In connexion with the subject of getting in the legal estate direct from a first mortgagee as a protection against mesne incumbrances, the reader may be reminded that, if the purchaser receive notice, actual or constructive, before the purchase money be fully paid, of some mesne equitable incumbrance, he cannot safely complete without the incumbrancer's concurrence in the conveyance to him (*f*); and further that, if after the receipt of such notice the purchase should be completed with the concurrence only of the first mortgagee, who on being paid off out of the purchase money conveyed the legal estate and released his security, the purchaser would not be able to avail himself of the priority, which was enjoyed by the first mortgagee, as a protection against the mesne incumbrance, unless the intention appeared

(*f*) Above, pp. 497, 498; *Jared* v. *Clements*, 1903, 1 Ch. 428.

to keep alive for his own benefit the charge created by the first mortgage (*g*). In such a case, therefore, this intention should be clearly expressed in the deed of conveyance, though it would not be necessary to take an actual transfer of the first mortgage to a trustee for the purchaser (*h*). As we have seen (*i*), the purchaser is entitled, if he think fit, to keep alive for his own use any mortgage existing on the property sold either by express declaration or by having the same transferred to a trustee for him, or to a new mortgagee advancing part of the purchase money, provided always that he pay any increased expense thereby caused to the vendor. It may be thought that, where a mortgage is paid off out of the purchase money, it would always be desirable to keep alive the charge, in order to protect the purchaser against any mesne incumbrance of which he might, without knowing it, have received constructive notice (*k*). But it never was, and is not now, the practice to do this, the risk run being too small to counterbalance the inconvenience of always maintaining the charge (*l*). And under the present law as to constructive notice, the purchaser is no longer in danger of being affected with any notice acquired by his solicitor in some previous transaction of an equitable charge on the property (*m*). Where part of the purchase money is to be advanced by a new mortgagee, who requires that the legal estate shall be conveyed direct from some already existing mortgagee to himself (*n*), the purchaser must take care that the whole estate in the lands sold be conveyed to the new mortgagee by the deed of conveyance completing

(*g*) Above, p. 423.
(*h*) Above, p. 424.
(*i*) Above, pp. 423, 424, 552.
(*k*) This was the case in *Toulmin* v. *Steere*, 3 Mer. 210; above, p. 423.
(*l*) See Davidson, Prec. Conv. vol. ii. pt. i. 290, 324, 327, 4th ed., from which it is obvious that it was not the practice to keep alive a mortgage paid off out of the purchase money unless there were reason to suspect the existence of some mesne incumbrance: 1 Key & Elph. Prec. Conv. 483, 490, 4th ed.; 459, 465, 7th ed.
(*m*) Above, pp. 258—265.
(*n*) Above, p. 552.

the sale and a new equity of redemption limited to himself by the same deed. He will then be as well protected against unknown prior equities as the new mortgagee himself, for he will claim as purchaser under the same conveyance of the legal estate. But if he were to allow the new mortgagee to take a simple transfer of the old mortgage and himself take a conveyance from the vendor alone, he would be exposing himself to all the risks attendant on the purchase of an equity of redemption (*o*).

Framing the conveyance.

It is beyond the scope of the present work to give a complete account of all the principles and rules which ought to be observed in framing conveyances on sale. A few points must, however, be noted. And first, as to the extent to which the vendor's title should be recited or noticed. This will depend on the state of the title: but the general principle to be observed is that any recitals or statements inserted in the conveyance should not carry the history of the title any further back than is necessary in order to explain the assurance thereby made (*p*). Thus, where on investigation of the title, the vendor has proved that he is himself absolutely entitled to the whole estate contracted for in the land sold, it is in general unnecessary to show in the conveyance how he became so entitled. In such cases recitals may be dispensed with altogether (*q*). The old conveyancing practice, however, was to recite the conveyance to the vendor (*r*): although, as we have seen (*s*), if any recital at all be made, it is best for the purchaser that it should be a precise recital (as of the vendor's seisin in fee, in the case of freeholds) sufficient to estop the vendor and all claiming under him from setting up

Recitals.

(*o*) Above, pp. 419 *sq.*

(*p*) See 1 Dart, V. & P. 590.

(*q*) See Davidson's Prec. Conv. vol. i. p. 44; vol. ii. pt. i. pp. 229 *sq.*, 4th ed.

(*r*) Wms. Real Prop. 140, 363, 1st ed.; 192, 514, 13th ed.

(*s*) Above, p. 550.

a legal estate, which they have not at the time of conveyance, but may subsequently acquire (*t*). But it is thought to be permissible to depart from this principle where the vendor's title depends on proof of facts, as distinguished from deeds or other assurances (*u*). In such cases it is often convenient to recite the facts in order that on any resale of the land to be made after twenty years' time, the recitals may be used as *primâ facie* evidence of the facts (*x*). For example, where the vendor became entitled to the land sold as the heir of an intestate, it is very useful to recite the various matters of pedigree which establish the heirship (*y*); and this is particularly the case where the fact material to the title is negative, as that one had or left no issue (*z*). The utility of similar recitals is equally obvious where the vendor's title depends on the determination of an estate tail or of successive estates tail. Where land sold is subject to outstanding estates or incumbrances, which are all got in or released by the deed of conveyance (*a*), it will, as a rule, be necessary to recite the assurances under which the various conveying parties claim; and this may of course involve the statement of the title prior to the acquisition of the land by the vendor: but in these cases also the same principle should be observed of not carrying the title farther back than is necessary to explain the operative part of the deed. The draftsman's aim should be to frame a deed which shall be capable of serving as a good root of title (*b*) in time to come. For this reason it is desirable that the conveyance should show clearly the origin of every outstanding estate or interest assured, but should contain no reference to any documents or matters which it would be inconvenient to produce or explain on any

(*t*) Sug. V. & P. 558.

(*u*) See 1 Dart, V. & P. 591; above, p. 96.

(*x*) See above, p. 109.

(*y*) Above, pp. 104, 124; see also, p. 111.

(*z*) Above, p. 105.

(*a*) Above, p. 548.

(*b*) Above, p. 87.

future dealing with the land, when the present conveyance might be treated as the root of title. For this reason also no assurance or other document, which is not a necessary part of the title, should ever be recited or noticed. Thus contracts for the sale of land, which are in general superseded by the conveyances made in pursuance thereof, should never be stated in recital as being entered into by some particular document, unless in exceptional circumstances making that document an essential part of the title (*c*). The agreement only to sell is commonly referred to in conveyances on sale, the written memorandum of the contract not being mentioned (*d*). As we have seen (*e*), the vendor cannot be required to execute a deed containing any recital, which is contrary to the truth: but he cannot object to execute an assurance, which will duly carry out his obligation of conveying the property sold, but contains no recitals (*f*).

1 Dart (1905) 550.

Parcels.

With respect to the parcels or description of the property sold, it appears that the purchaser is entitled to have inserted in the conveyance such a description of the property sold as will clearly identify the land intended to be assured. If, therefore, the description of the property sold contained in the contract be misleading, inadequate or obsolete, the purchaser should insert in the draft conveyance an accurate description of the land, according to its present condition, prepared from his own surveyor's report; and it is thought that in these circumstances the vendor could not refuse to convey the land by the new description (*g*). It is, however, questionable whether a vendor, who has sold lands by a description accurately applying to them, and

(*c*) See above, p. 464; 1 Dart V & P (1905) 550.
(*d*) 1 Dart, V. & P. 595, 596; above, p. 555, nn. (*q*), (*r*).
(*e*) Above, p. 545.
(*f*) *Hartley* v. *Burton*, L. R. 3 Ch. 365.
(*g*) See Davidson, Prec. Conv. i. 82 *sq.*, 4th ed. Sansom & Norbeth (1910) 1 Ch 741.

has completely discharged the obligations imposed on him of proving the identity of the lands described in the contract with those described in the muniments of title and with those of which possession is offered (*h*), can be required to convey and to covenant for title by a different description from that by which he sold. If he has satisfactorily proved title and identity, his only remaining obligation seems to be to convey what he has contracted to sell, that is, the land described in the contract; and it is thought that in such case he cannot be compelled to undertake the burden of verifying a new description of the lands (*i*). It is always desirable that the conveyance should contain a complete verbal description, independent of any plan, of the property sold and that any plan of the land referred to or drawn on the deed should be auxiliary only (*k*). If, as is sometimes unavoidable, the property is so described by reference to a plan that the plan is made a material part of the description (*l*), extreme care should be taken in checking the accuracy of the plan (*m*). When lands are conveyed by a new description not contained in any of the title deeds, it is always desirable in framing the deed of conveyance to connect the new description with the old by stating that the lands were formerly known by the old description (giving it) (*n*). Such a statement will in twenty years become *primâ facie* evidence of identity on sales (*o*). When mortgagees, who are paid off, or trustees join in a conveyance on sale, they

Description independent of or by reference to a plan.

Connecting a new description with the old.

Mortgagees and trustees convey by the

(*h*) Above, pp. 36, 115, 136.

(*i*) Above, p. 547, and n. (*e*).

(*k*) 1 Dart, V. & P. 601; Davidson, Prec. Conv. i. 85, 86, 4th ed.; i. 65, 66, 5th ed.

(*l*) See above, p. 95.

(*m*) For instances of the effect of a conveyance of lands described by reference to a plan, which was inaccurate, see *Llewellyn* v. *Jersey*, 11 M. & W. 183; *Lyle* v. *Richards*, L. R. 1 H. L. 222; *May* v. *Platt*, 1900, 1 Ch. 616. For an example of a reference to a schedule of parcels and a plan controlling a general description, see *Barton* v. *Dawes*, 10 C. B. 261. For a case of an ambiguous general description being controlled by recitals, see *Walsh* v. *Trevanion*, 15 Q. B. 733.

(*n*) Davidson, Prec Conv. i. 83, 4th ed.; i. 63, 5th ed.

(*o*) Above, p. 109.

description under which they took.

are not, as a rule, bound to convey by any other description than that by which the land was conveyed to them (*p*). If in such cases a new description be desirable for and can be required by the purchaser, and the mortgagees or trustees will not abate anything of their strict rights, the conveyance must be so framed that the mortgagees or trustees convey by the old description, and that any conveyance of the land by the new description or any statement that the land conveyed by the old description is now more accurately described by the new is the conveyance or statement of the vendor only. Trustees of lands under a simple trust are, however, bound to *execute the estate* (*q*); and if the equitable interest therein become vested by assignment or otherwise in several persons, of whom each is entitled in severalty to a particular parcel of the lands, the trustees must at the request of all convey to each the legal estate in his own part; and this may of course involve their conveying by a new description (*r*). But there is an oft-cited *dictum* of Lord Eldon (*r*) that a trustee cannot be compelled to divest himself of his trust by different parcels at different times. It appears, however, that an assignee from the *cestui-que-trust* of a part of the trust property is entitled, on proving to the trustee that the whole equitable estate or interest in that part is now vested absolutely in himself, to require the trustee to convey to him the legal estate or interest therein (*s*). Mortgagees cannot of course be required to release from their security any part of the land

(*p*) *Goodson* v. *Ellisson*, 3 Russ. 583, 594; see *Mostyn* v. *Mostyn*, 1893, 3 Ch. 376.

(*q*) Wms. Real Prop. 168, 178, 19th ed.

(*r*) *Goodson* v. *Ellisson*, ubi sup.

(*s*) This is clearly established with regard to funds of money or stock, &c.: *Smith* v. *Snow*, 3 Madd. 10; *Lenaghan* v. *Smith*, 2 Ph. 301, 302; *Re Radcliffe*, 1892, 1 Ch. 227; and it seems from the decree ultimately made that this principle was really recognised by Lord Eldon in *Goodson* v. *Ellisson*, 3 Russ. 596, subject to the trustee's right to be protected by the order of the Court in a case of doubt or difficulty.

charged without the whole amount due to them being paid (*t*). But it sometimes happens, where a small portion of lands in mortgage is sold, that the mortgagees, being satisfied that the remainder of the lands is an ample security for the money due to them, concur in the conveyance to the purchaser to convey the legal estate and release their charge without receiving any part of the purchase money. No difficulty can arise when this course is taken, if the mortgagees be beneficially entitled to the mortgage money, or if the purchaser have no notice that they are not so entitled (*u*). In either case he takes as a purchaser for value from the mortgagees, they conveying to him at the mortgagor's request in consideration of his paying the purchase money to the mortgagor; and there is no question of the adequacy of this consideration as regards the mortgagees, where they are apparently entitled for their own use. But if the purchaser should have notice that the mortgagees are trustees of the mortgage money, the question arises whether they have power, as against their *cestui-que-trusts*, to release gratuitously any part of their security. It is said that, at least where the trustees have the usual power of varying investments, they are justified in so releasing a portion of the property charged, provided that their security is not substantially impaired (the transaction being equivalent

Trustee-mortgagees gratuitously releasing part of their security.

(*t*) The rule was that the only right enforceable by a mortgagor, and those claiming under him, against a mortgagee, whose estate had become absolute at law, was the equity of redemption on repayment of principal, interest and costs: *Dunstan* v. *Patterson*, 2 Ph. 341, 345; *Chichester* v. *Donegall*, L. R. 5 Ch. 497, 502. This rule has been modified by enactments in the Conveyancing Act of 1881 obliging mortgagees to execute a transfer of their mortgages, instead of reconveying, on the terms on which they would be bound to reconvey, and giving to mortgagors under mortgages made after that year the right to inspect the title deeds of the mortgaged property: but otherwise it remains in full force. See stats. 44 & 45 Vict. c. 41, ss. 15, 16; 45 & 46 Vict. c. 39, s. 12; *Teevan* v. *Smith*, 20 Ch. D. 724.

(*u*) Above, p. 250.

to the calling-in and re-investment of the money secured), and that the purchaser is entitled to assume that their power has been properly exercised (*x*). But it must not be forgotten that trustees advancing money on mortgage of land have no right to release any part of the land charged for the mere convenience of the mortgagor (*y*); even in exercising an express power to release or compromise a claim, they are bound to act reasonably and in good faith for the advantage of their *cestui-que-trusts* (*z*). It seems, therefore, that where mortgagees, being to the knowledge of the purchaser trustees, release part of the mortgaged lands to a purchaser without any valuable consideration given to them, they act, *primâ facie*, to the disadvantage of their *cestui-que-trusts*, and the purchaser appears to take the risk of proving that the transaction was proper; failing which the release would be invalid against the beneficiaries (*a*). And it is certainly advisable for a purchaser, proposing to accept such a conveyance from trustee-mortgagees, to satisfy himself that their security will not be impaired in any substantial degree by the release, and to obtain evidence of this fact, which he can produce on any future sale or mortgage of the land.

General words.

As is well known, before the year 1882 it was the practice in drawing conveyances of land to add to the *parcels*, or description of the property to be assured, a number of *general words*, comprehending all easements, rights, privileges or advantages appertaining or reputed to appertain thereto or therewith used and enjoyed (*b*). This addition was unnecessary and of no effect as

(*x*) Davidson, Prec. Conv. vol. ii. pt. i. 347, n., 4th ed.; see 2 Dart, V. & P. 612, 5th ed.; 690, 6th ed.

(*y*) See Lewin on Trusts, 495, 6th ed.; 706, 10th ed.

(*z*) See *Blue* v. *Marshall*, 3 P. W. 381; *Pennington* v. *Healey*, 1 C. & M. 402, 407; *Re Alexander*, 13 Ir. Ch. 137.

(*a*) See *Pell* v. *De Winton*, 2 De G. & J. 13; 2 Dart, V. & P. 689, 690.

(*b*) Wms. Real Prop. 193, 331, 515, 13th ed.; 415, 595, 661, 19th ed.; Davidson, Prec. Conv. vol. i. 91 *sq.*; vol. ii. pt. i. 231, 4th ed.

regards any rights legally appendant or appurtenant to the land conveyed; for all such rights pass by a conveyance of the land without being mentioned (*c*). But so far as the general words comprised any privileges or advantages *used or enjoyed* with the land conveyed, they might have the effect of an express grant by the conveying party, as a legal easement or right, of some privilege or advantage, previously used or enjoyed for the benefit of or in connexion with the land conveyed, over some other land of his own (*d*). Since the Conveyancing Act of 1881 (*e*) took effect, it has been the practice to omit general words from conveyances in reliance on the provisions contained in the 6th section of that Act. These provisions resemble the general words formerly in use, not only in including in conveyances a superfluous assurance of all easements and rights appertaining to the land conveyed, but also in incorporating therein an express conveyance of all privileges or advantages enjoyed with the land conveyed *at the time of conveyance* (*f*); and this conveyance may operate, in the same manner as general words, to grant, as a legal easement or right, some privilege or advantage enjoyed in fact at the time of conveyance for the benefit of the land assured over other land belonging to the grantor (*g*). It is therefore necessary to consider what easements or like privileges a purchaser of land may require to be conveyed to him.

What ease-

A contract for the sale of a piece of land, either with

(*c*) Litt. s. 183; Co. Litt. 121 b; Williams on Commons, 315.

(*d*) *Watts* v. *Kelson*, L. R. 6 Ch. 166; *Kay* v. *Oxley*, L. R. 10 Q. B. 360; *Barkshire* v. *Grubb*, 18 Ch. D. 616; Williams on Commons, 170, 315—319, 323, 324; Wms. Conv. Stat. 64—66.

(*e*) Stat. 44 & 45 Vict. c. 41, which came into operation immediately after the 31st December, 1881; see Wms. Conv. Stat. 60 *sq.*

(*f*) This does not exactly follow the usual form of general words, which mentioned all rights, &c. *now or heretofore* enjoyed with the land. As to the effect of this difference, see *Hall* v. *Byron*, 4 Ch. D. 667, 671, 672; Wms. Conv. Stat. 68.

(*g*) *Broomfield* v. *Williams*, 1897, 1 Ch. 602; *International Tea Stores Co.* v. *Hobbs*, 1903, 2 Ch. 165; see *Quicke* v. *Chapman*, 1903, 1 Ch. 659.

ments or other privileges the purchaser can require to be conveyed to him.

or without mention of "the appurtenances," passes (equally with a conveyance at common law of the legal estate therein (*h*)) only such rights, privileges or easements, as are legally appendant or appurtenant thereto; and does not, in absence of special stipulation, entitle the purchaser to have conveyed to him any privileges or advantages which were used by the vendor in connexion with the land sold over adjoining or other land of his own, but are not *necessary* for the enjoyment of the property as sold (*i*). And the 6th section of the Conveyancing Act of 1881 (*k*) affects only conveyances of land made by deed and does not apply to contracts for the sale of land (*l*). It follows, therefore, that if the conveyance, as drawn on the purchaser's behalf, incorporate tacitly, according to the present practice, the provisions of this enactment, and these provisions would, if uncontrolled, operate to grant to the purchaser as an easement or a right some advantage previously enjoyed in fact by the vendor, but not included in the contract for sale, the vendor is entitled to require that words shall be inserted modifying the statutory provisions to the extent necessary to give to the contract for sale its true effect (*m*). And in such cases the vendor should

(*h*) Wms. Real Prop. 415, 19th ed.; Wms. Conv. Stat. 64, 65; above, p. 562.

(*i*) *Bolton* v. *Bolton*, 11 Ch. D. 968; *Barkshire* v. *Grubb*, 18 Ch. D. 616, 620; *Re Peck and London School Board*, 1893, 2 Ch. 315; *Re Hughes and Ashley's Contract*, 1900, 2 Ch. 595. But, of course, if the vendor induce the purchaser to enter into the contract by a representation that he shall have some privilege over other land of the vendor's, the vendor cannot enforce the contract without granting the same as a legal right: see the last mentioned case. See also *Birmingham, &c. Banking Co.* v. *Ross*, 38 Ch. D. 295; *Burrows* v. *Lang*, 1901, 2 Ch. 502; *Godwin* v. *Schweppes, Ld.*, 1902, 1 Ch. 926. So the sale of a house having windows overlooking land not belonging to the vendor implies no warranty that the vendor has a right to the access of light through those windows: *Greenhalgh* v. *Brindley*, 1901, 2 Ch. 324; but if the vendor were to represent (contrary to the fact) that he had such right, he could not enforce the contract.

(*k*) Stat. 44 & 45 Vict. c. 41 (see sect. 2 (v)); above, p. 562.

(*l*) *Re Peck and London School Board*, 1893, 2 Ch. 315, 318.

(*m*) *Re Peck and London School Board*, and *Re Hughes and Ashley's Contract*, ubi sup.

be most careful to have the effect of the enactment in question duly limited by express words, or he may find, after conveyance, that he has subjected the land retained by him to some easement or other right which he did not intend to grant when he made the contract for sale (*n*). If so, he will have no remedy but to bring an action for the rectification of the conveyance; and this relief (apart from fraud) will be granted only in case of common and not of unilateral mistake (*o*). If, however, the use of some privilege or advantage over adjoining land retained by the vendor be necessary to the proper enjoyment, as contemplated by the contract (*p*), of the property sold, the purchaser will be entitled to have that privilege or advantage granted to him by the conveyance as a legal easement or right. Indeed, where the easement would be necessary and continuous, as in the case of a right to the access of light, or even necessary only, such as a way of necessity (*q*), a grant thereof would be implied from the mere conveyance of the land to which it was necessarily accessory. But in such cases the purchaser is not obliged to rest content with such grant as would be implied in law from the conveyance of the land. He is certainly entitled to have such an express grant of the privilege or advantage in question as would be made by incorporating in the conveyance, without any restriction, the statutory general words. And since the object of the conveyance is to carry out with certainty the intention of the parties to the contract, it is thought that, if the conveyance as drawn on the purchaser's behalf contain a grant defining accurately in express words some privilege or advantage

(*n*) See *Broomfield* v. *Williams*, 1897, 1 Ch. 602; *Pollard* v. *Gare*, 1901, 1 Ch. 834; *International Tea Stores Co.* v. *Hobbs*, 1903, 2 Ch. 165.

(*o*) 2 Dart, V. & P. 838, 839; *May* v. *Platt*, 1900, 1 Ch. 616.

(*p*) See *Bayley* v. *Great Western Rail. Co.*, 26 Ch. D. 434, 441, 442, 452, 453.

(*q*) See *Wheeldon* v. *Burrows*, 12 Ch. D. 31; *Broomfield* v. *Williams*, 1897, 1 Ch. 602, 610, 612; *Pollard* v. *Gare*, 1901, 1 Ch. 834; and consider the case cited in the previous note.

impliedly sold by the contract and to be enjoyed over some land retained by the vendor, the vendor cannot object to execute the conveyance in that form. As the vendor may, where necessary, exclude or restrict the operation of the statutory general words and, in place thereof, define his liabilities in express and unambiguous terms (*r*), so the purchaser is not obliged to accept the general description of his rights which would be given by such general words (a description which cannot be reduced to certainty without proof of the facts existing at the time of conveyance (*s*)), but is entitled to have such rights particularly and exactly defined (*t*). Any easements or other accessory rights expressly mentioned in the contract as being included in the sale should of course be expressly granted in the conveyance.

Reservations in the vendor's favour.

Where the vendor has stipulated in the contract for the reservation in his own favour of any easement or other right over the land sold, care must be taken that due effect is given to such stipulation in the conveyance; otherwise the vendor will have no remedy to assert his right but to sue for rectification of the conveyance (*u*). The vendor may be entitled to some reservation over the property sold, not only by express agreement, but by implication from the circumstances surrounding the contract; as where the purchaser buys with notice of the fact that the adjoining property of the vendor is laid out for building, and access thereto across the land sold will obviously be necessary (*x*). And a vendor may by the like implication, as well as by express contract, be

(*r*) Above, p. 563.

(*s*) See the cases cited above, p. 562, nn. (*d*), (*f*), (*g*).

(*t*) See *Bolton* v. *Bolton*, 11 Ch. D. 968; *Barkshire* v. *Grubb*, 18 Ch. D. 616, 620; *Re Peck and London School Board*, 1893, 2 Ch. 315; *Re Hughes and Ashley's Contract*, 1900, 2 Ch. 595; and consider *Re Birmingham, &c. Co. and Allday*, 1893, 1 Ch. 342.

(*u*) See *Teebay* v. *Manchester, &c. Rail. Co.*, 24 Ch. D. 572; Williams on Commons, 322.

(*x*) *Davies* v. *Sear*, L. R. 7 Eq. 427.

entitled to reserve to himself the unrestricted use of some adjoining land of his, which would otherwise have become subject to an easement or right (as to access of light) in the purchaser's favour (*y*); as where the purchaser of a house with windows overlooking land adjoining and retained by the vendor has notice that the land is laid out for building in a manner obviously inconsistent with the acquisition by the purchaser of any such right (*z*). But except by virtue of such express or implied contract, the vendor has no claim to the reservation in his own favour of any right over the land sold, or, where the exercise of some easement or privilege over any adjoining land of his would otherwise be necessary to the enjoyment of the property sold, to the reservation in his own favour of such right of free use of the adjoining land as will exclude the acquisition of such privilege or easement (*a*). For example, if a vendor offer for sale by auction in different lots a house and land adjoining, which the windows of the house overlook, and the land be sold at the auction, but not the house, the purchaser of the land will be entitled to build thereon so as to obstruct the access of light to the windows (*b*). Whereas, if the house were sold but not the land, the purchaser would acquire by implication an easement of access of light over the land and the vendor would not be entitled to build so as to obstruct such access (*c*); unless, as we have seen, the purchaser bought with notice of the vendor's intention to build thereon in a manner inconsistent with the acquisition of such an

(*y*) See above, p. 563.

(*z*) See *Birmingham, &c. Banking Co.* v. *Ross*, 38 Ch. D. 295; *Godwin* v. *Schweppes, Ld.*, 1902, 1 Ch. 926.

(*a*) See above, pp. 563, 564, and cases there cited.

(*b*) *Ellis* v. *Manchester Carriage Co.*, 2 C. P. D. 13; *Wheeldon* v. *Burrows*, 12 Ch. D. 31.

(*c*) *Palmer* v. *Fletcher*, 1 Lev. 122; Holt, C. J., *Tenant* v. *Goldwin*, 2 Ld. Raym. 1089, 1093; Thesiger, L. J., *Wheeldon* v. *Burrows*, 12 Ch. D. 31, 51; Jessel, M. R., *Allen* v. *Taylor*, 16 Ch. D. 355, 357, 358.

easement (*d*). And if both lots were sold at the same time, the purchaser of the house would acquire an easement of the access of light over the land; for on a sale or conveyance at one and the same time to different persons of two tenements belonging to the same owner, there is implied, unless a contrary intention appear, a grant of all easements over one tenement which are necessary for the enjoyment of the other (*e*). Where two tenements belonging to one owner exercise each over the other some privilege necessary to their proper enjoyment, as where two houses are built together and supported by one party wall, then, on a sale or conveyance of one of the tenements, there will be implied, not only a grant of an easement of support in favour of the purchaser or other alienee, but also a reservation of the like easement to the owner retaining the other tenement (*f*).

Where the property is sold subject to some incumbrance.

If the property were sold subject to some particular incumbrance, which is to remain undischarged, such as a mortgage, restrictive covenants, an easement, or a subsisting tenancy for any term, the vendor is of course entitled to require that it shall be expressed in the conveyance that he conveys the land sold subject to the incumbrance in question. And the conveyancer acting for him should be particularly careful to see that this is done; as the statutory covenants for title, which are now usually incorporated in conveyances on sale, include covenants for right to convey and quiet enjoyment, subject only as *expressed* in the conveyance, and for freedom from incumbrances other than those subject to which the conveyance is *expressly* made (*g*). So that if

(*d*) Above, pp. 565, 566.

(*e*) *Swansborough* v. *Coventry*, 9 Bing. 305; *Barnes* v. *Loach*, 4 Q. B. D. 494; *Allen* v. *Taylor*, 16 Ch. D. 355.

(*f*) *Richards* v. *Rose*, 9 Ex. 218; Thesiger, L. J., *Wheeldon* v. *Burrows*, 12 Ch. D. 31, 50.

(*g*) Stat. 44 & 45 Vict. c. 41, s. 7 (1A).

the vendor omit to specify in the conveyance the incumbrance, subject to which he sold, and convey as beneficial owner, he lays himself open to an action on his covenants for title, to which his only defence would be to plead the terms of the contract for sale and counterclaim for rectification of the conveyance (*h*). Where the contract for sale contains the common stipulation (*i*) that the property is sold subject to all chief and other rents, rights of way and water and other easements (if any) charged or subsisting thereon, and to all leases, tenancies and occupations, whether mentioned in the particulars of sale or not, and to all rights and claims of lessees, tenants and occupiers, it may perhaps be argued that the vendor is in strict law entitled to insist that he shall convey according as he contracted to sell, namely, subject to these incumbrances; and that none the less, where the purchaser has inquired whether there are any such incumbrances (*k*) and received the reply that the vendor is not aware of any (*l*). For as we have seen (*m*), it is only against such incumbrances as the vendor was not aware of that this stipulation has any force; and the vendor certainly appears to be entitled to limit his liability under the statutory covenants for title, so that he shall not be sued for any defects of title so arising. But it is not, and has never been, the practice of conveyancers to insert in conveyances on sale any words qualifying, by reference to possible incumbrances of this kind, either the assurance made or the covenants for title entered into by the vendor (*n*); for it is under-

(*h*) See *Page* v. *Midland Rail. Co.*, 1894, 1 Ch. 11; *May* v. *Platt*, 1900, 1 Ch. 616. As to obtaining rectification on this ground, see *Coldcot* v. *Hill*, 1 Ch. Ca. 15; *Feilder* v. *Studley*, Finch, 90; Sug. V. & P. 609; 2 Dart, V. & P. 886.

(*i*) Above, pp. 60, 61, and n. (*w*).

(*k*) Above, p. 141.

(*l*) It is submitted that if the vendor has answered positively that there are not any such incumbrances, he cannot insist on having the same mentioned in the conveyance.

(*m*) Above, pp. 61, n. (*w*), 141.

(*n*) This appears from an examination of the precedents contained in Davidson, Prec. Conv. vol. ii. pt. i. 4th ed., considered

stood that the stipulation in question is merely intended to protect the vendor against any objection to the title on account of incumbrances of the kind mentioned, which may exist without the vendor's knowledge, and may be discovered in the course of the investigation of title, and that the purposes of the clause are exhausted when the title has been investigated without the discovery of any such incumbrance (*o*). And it would be a great hardship on the purchaser for such words to be inserted in the conveyance, as they would put everyone taking under the conveyance upon inquiry, whether there were such incumbrances or not (*p*). It is thought, therefore, that the Court would not oblige a purchaser, who bought under such a stipulation, to accept a conveyance, in which the assurance made by the vendor was qualified by such words, especially when it is considered that under an innocent conveyance (*q*) the vendor assures the land described for such estate or interest only as he really has therein and subject to all legal liabilities actually affecting the same (*r*). But it is thought that the vendor would be entitled to insist on limiting the statutory covenants for title so that they should not extend to indemnify the purchaser against any incumbrance, whether known or unknown, subject to which the sale was expressly made. It is not, however, the practice to insist on such a limitation with regard to the possible incumbrances specified in the above-mentioned common condition of sale. If in any particular case it were desired to insist on this limitation of the covenants, it should be carried out by a clause expressly modifying the effect of the statutory covenants and not by

with reference to the fact that the stipulation in question is one of the general conditions of sale: Ibid. i. 611, 4th ed.; i. 521 and n., 5th ed. See also 1 Key & Elph. Prec. Conv. 260, n. (*c*), 4th ed.; 244, n. (*d*), 7th ed.

(*o*) Dart, V. & P. 156, 5th ed.; 176, 6th ed.

(*p*) *Re Alms Corn Charity*, 1901, 2 Ch. 750.

(*q*) Above, p. 551, n. (*z*).

(*r*) *Hardman* v. *Child*, 28 Ch. D. 712, 717.

expressing that the conveyance is made subject to the incumbrances mentioned in the condition. If it be stipulated in the contract for sale that the property is sold *and shall be conveyed* subject to the incumbrances above mentioned (*s*), the purchaser cannot object to the insertion in the conveyance of the same words as are contained in the contract (*t*). The vendor cannot oblige the purchaser to take a conveyance of the land sold subject to any other incumbrances than those subject to which the purchaser expressly or impliedly (*u*) agreed to buy (*w*).

Sale of such estate as the vendor has.

If the vendor should have sold only such estate or interest as he has in some particular land, he is of course entitled to require that he shall convey the same thing only and in the same words. But if land were sold by a particular description, with a stipulation that the purchaser shall accept such title as the vendor has (*x*), the case is different, and the vendor would be obliged to convey the land as described in the contract, without any words limiting the assurance to his actual interest therein (*y*). In such case, however, it is thought that the contract is equivalent to an agreement to buy subject to such incumbrances or defects of title as may appear upon investigation to exist, and that the vendor would therefore be entitled to limit his covenants for title so as to prevent any action thereon being brought against him by reason of such incumbrances or defects (*z*). It may be observed that the usual vendor's

(*s*) Above, p. 568.

(*t*) *Gale* v. *Squier*, 4 Ch. D. 226, 5 Ch. D. 625.

(*u*) As where the purchaser buys with notice that the land is subject to some irremovable incumbrance, and the vendor does not *expressly* contract to show a good title; above, p. 164.

(*w*) *Re Monckton and Gilzean*, 27 Ch. D. 555; *Hardman* v. *Child*, 28 Ch. D. 712; *Mostyn* v. *Mostyn*, 1893, 3 Ch. 376; *Re Wallis and Barnard's Contract*, 1899, 2 Ch. 515.

(*x*) Above, p. 163.

(*y*) See above, p. 569.

(*z*) See the cases cited, above, p. 568, n. (*h*).

qualified covenants for title, whether given in express terms or incorporated in the conveyance by statute, do not confer any indemnity against the purchaser's eviction by title paramount to that of the vendor's own predecessors in title; they extend only to the purchaser's disturbance by reason of some act, omission or incumbrance, of the vendor himself or any person through whom he derives title, otherwise than by purchase for value (*a*). A disseisor, therefore, or even a man having no title at all, not so much as a disseisor's estate (*b*), if he sold and conveyed *as beneficial owner* the land, into which he had wrongfully entered or which he had wrongfully assumed was his, would incur no liability on the statutory covenants for title in case of the ejectment of the purchaser by the rightful owner.

Sale of land subject to restrictive covenants.

If one sell a single piece of land on the terms that the purchaser shall enter into covenants restrictive of the use of the land, the vendor is of course not bound, in the absence of express or implied stipulation or of representation to the contrary, to enter into any similar covenants or to observe the like restrictions with regard to any adjoining land retained by him (*c*). If lands be offered for sale in lots, either at *one sale* by auction or in a series of consecutive private sales, on the terms that each purchaser shall enter into restrictive covenants as to the lot bought by him, it is, in the absence of express stipulation, a question to be decided on consideration of all the circumstances and conditions of the sale whether there is implied in the contract for the sale of any lot an agreement that the vendor shall be bound by the

(*a*) *Browning* v. *Wright*, 2 B. & P. 13; *Hesse* v. *Stevenson*, 3 B. & P. 565, 574; *Nind* v. *Marshall*, 1 Brod. & B. 319; *Stannard* v. *Forbes*, 6 A. & E. 572; Sug. V. & P. 602, 603, 605—609; *Howard* v. *Maitland*, 11 Q. B. D. 695.

(*b*) This is an estate in fee simple: see Williams on Seisin, 7, 10; *Leach* v. *Jay*, 9 Ch. D. 42, 44.

(*c*) See *Tucker* v. *Vowles*, 1893, 1 Ch. 195; *Rowell* v. *Satchell*, 1903, 2 Ch. 212; *Osborne* v. *Bradley*, 1903, 2 Ch. 446; above, p. 431, n. (*y*).

restrictive covenants as to any lot remaining unsold (*d*). If it appear that the offer made by the vendor was in effect that each purchaser should have a lot forming part of an estate subject to a general scheme of restrictive covenants enforceable by as well as against all owners of any part thereof, the vendor will be bound to enter into like restrictive covenants with the purchaser, as regards any lot remaining unsold; and will be bound in equity to observe the restrictions, though he do not enter into any such express covenant (*e*). But if it appear that the vendor merely offered each lot to be sold subject to restrictive covenants to be entered into with himself by each purchaser, and did not offer, as part of the contract or as an inducement to buy, the advantage of the whole property put up for sale being subject to the same covenants, then the purchaser of any lot will have no claim to enforce any restriction over any lot remaining unsold, or to require the vendor to enter into any covenant in respect thereof (*f*). In any case in which it is either an express or an implied term of the contract for sale that any land retained by the vendor shall be subject to any restriction in the purchaser's favour, the purchaser is entitled to require the vendor on completion to enter into a covenant with him to that effect (*g*). The case is exactly parallel to that of an express or implied contract to grant an easement over land retained by the vendor (*h*).

Estate clause.

The estate clause always inserted in conveyances of land before the year 1882, and purporting to assure all

(*d*) Above, p. 428, and n. (*g*); *Nottingham Patent Brick, &c. Co.* v. *Butler*, 16 Q. B. D. 778, 784, 785; *Collins* v. *Castle*, 36 Ch. D. 243.

(*e*) See cases cited in previous note; *Re Birmingham, &c. Co. and Allday*, 1893, 1 Ch. 342; *Davis* v. *Leicester*, 1894, 2 Ch. 208, 219, 227, 232; *Holford* v. *Acton Urban Council*, 1898, 2 Ch. 240; *Rowell* v. *Satchell*, 1903, 2 Ch. 212.

(*f*) *Tucker* v. *Vowles*, 1893, 1 Ch. 195; *Holford* v. *Acton Urban Council*, 1898, 2 Ch. 240; above, p. 571, n. (*e*).

(*g*) *Re Birmingham, &c. Co. and Allday*, 1893, 1 Ch. 342; *Davis* v. *Leicester*, 1894, 2 Ch. 208, 220.

(*h*) Above, pp. 564, 565.

the conveying party's estate or interest in the land conveyed (*i*), went out of use after the commencement of the Conveyancing Act of 1881 (*k*); the 63rd section of that Act providing that every conveyance shall by virtue of that Act be effectual to pass all the conveying party's estate or interest in the property conveyed, but this enactment shall apply only if and as far as a contrary intention is not expressed in the conveyance and have effect subject to the terms of the conveyance and the provisions therein contained. Having regard to this express saving and to the construction placed on the estate clause formerly usual (*l*), it is thought to be unnecessary expressly to exclude the operation of that enactment upon conveyances assuring in proper terms less than the whole estate of the party conveying, such as leases for life or years, or gifts in tail. But if upon the sale of the fee simple, or other the vendor's whole estate in some land, it is stipulated that some exception or reservation shall be made, the same must of course be clearly defined in the deed of conveyance (*m*); for if all mention thereof be omitted, the deed will take effect at law according to its terms, and the vendor's only remedy will be an action for rectification of the conveyance (*n*).

Limitation of the purchaser's estate.

The reader may be reminded that, although a contract for the sale of land, without defining the estate to be sold therein, is intended to mean a sale of the freehold in fee (*o*), this rule has no application to a conveyance on sale, in which the estate to be taken by the purchaser

(*i*) 1 Davidson, Prec. Conv. 94, 4th ed.; see Wms. Conv. Stat. 242; Wms. Real Prop. 606, 19th ed.

(*k*) Stat. 44 & 45 Vict. c. 41.

(*l*) See *Blundell* v. *Stanley*, 13 Jur. 998; *Hunt* v. *Remnant*, 9 Ex. 635; *Rooper* v. *Harrison*, 2 K. & J. 86, 113; *Neame* v. *Moorsom*, L. R. 3 Eq. 91; *Francis* v. *Minton*, L. R. 2 C. P. 543; 1 Davidson, Prec. Conv. 94, 95, 4th ed.

(*m*) See 1 Davidson, Prec. Conv. 95—98, 4th ed., also showing the difference between an exception and a reservation.

(*n*) Above, pp. 564, 568.

(*o*) Above, p. 34.

must be duly limited or marked out, either by the use of the words necessary to convey the fee at common law, or by the exact expressions mentioned in the 51st section of the Conveyancing Act, 1881 (*p*). If, therefore, an estate in fee simple were sold, the land must be conveyed either to the purchaser and his heirs or to him in fee simple, and no other words will suffice to effect this or (excepting the words proper to confer an estate tail) will avail to convey a greater estate than for the grantee's life (*q*). And it must not be forgotten that where the land sold is to be conveyed to a grantee to uses, it is equally necessary to limit to him an estate in fee simple in express and proper terms, otherwise he takes an estate for his own life only in the land conveyed, with the consequence that the same legal estate and no more will pass under the Statute of Uses (*r*) to the person or persons to whose use it is expressed that he shall hold the land (*s*). But if the purchaser should, through a mistake of this kind, acquire by the conveyance a less estate at law than he was entitled under the contract to have assured to him, he will nevertheless be entitled in equity to such an estate as he actually purchased in the land, and will be entitled to have the conveyance rectified accordingly (*t*). This consideration has an important bearing on cases where an equitable estate in lands is limited in a deed by words which would be insufficient to convey the fee if the estate were legal, but indicate an intention to pass the entire equitable estate. It is settled that equity follows the law to this extent, that a grant by deed of an equitable estate in lands to the grantee simply, without any words of limitation *or any other words indicating an intention to*

Limitation by deed of equitable estates in land.

(*p*) Stat. 44 & 45 Vict. c. 41.

(*q*) *Re Ethel and Mitchells and Butler's Contract*, 1901, 1 Ch. 945, where the limitation was to the grantee *in fee;* Wms. Real Prop. 201, 202, 19th ed.

(*r*) Stat. 27 Hen. VIII. c. 10.

(*s*) Above, p. 138.

(*t*) *Re Ethel and Mitchells and Butler's Contract*, 1901, 1 Ch. 945, 948.

pass the fee, will confer an estate for the grantee's life only (*u*). But it is otherwise if the deed show an intention to transfer the grantor's whole equitable interest in the land (*x*). Thus, if A. agree with B. to buy the lands of which C. is seised in fee on trust for B. in fee, or to buy B.'s equity of redemption in the lands comprised in B.'s mortgage to D., and B. convey these lands to A. by a deed, in which the nature of the agreement between the parties is by recital or otherwise sufficiently shown and the payment of the purchase money is stated as the consideration, but which contains no words or no correct technical words of limitation of the fee simple to A., it is submitted that A. will none the less be entitled to the entire equitable estate in the lands. But, of course, it would be proper in such a case for A. to take a conveyance to himself and his heirs or in fee simple.

Vendor of land bound to give the usual covenants for title.

Every vendor of land, besides conveying the land sold to the purchaser, is bound, unless it appear from the contract that he was selling as a trustee or mortgagee (*y*), to enter into the usual qualified covenants for title. That is to say, he must covenant with the purchaser that he has power to convey the land as expressed in the conveyance, that the premises shall be quietly enjoyed and that the same are free from any incumbrance, and also, if the property sold were leasehold, that the lease is valid, the rent has been paid and the covenants performed: but all these covenants are limited to indemnifying the purchaser against disturbance by reason only of some act, omission or

(*u*) See *Re Whiston's Settlement*, 1894, 1 Ch. 661, and the cases there cited.

(*x*) See Shep. Touch. (Preston's ed.) 106; Preston on Estates, ii. 64—66; Hayes on Conveyancing, 91, 92, 5th ed.; Lewin on Trusts, 95, 6th ed., 117, 10th ed.: Wms. Real Prop. 165, 13th ed., 181, 19th ed.

(*y*) See *Worley* v. *Frampton*, 5 Hare, 560; Sug. V. & P. 69, 575; 1 Dart, V. & P. 662; Wms. Real Prop. 449, 13th ed.; Davidson, Prec. Conv. vol. ii. pt. i. 191, 261, n. (*u*), 296, n., 4th ed.

sufferance of the vendor himself, or of any of his predecessors in title subsequent to the last sale of the land or the last conveyance thereof for other valuable consideration whereon proper covenants for title were given (*z*), or of any persons claiming under him or them. So that if the vendor purchased the land himself, he will covenant against disturbance by reason only of his own acts or those of persons claiming under him. And the vendor must also covenant for further assurance by himself or any one claiming under or in trust for him or any such of his predecessors in title as aforesaid (*a*). And although, as we have seen (*b*), a contract to sell land is an absolute undertaking, express or implied, to sell the fee simple or other estate specified, *free from incumbrances*, it is settled that, in the absence of express stipulation to the contrary, a vendor of land is not bound to give, in the conveyance of the land, any manner of warranty of title other than is afforded by these qualified covenants (*c*). And no other warranty of title (*d*) is implied on a sale of land made by one who assumes to deal therewith as owner, and completed by conveyance and payment of the purchase money (*e*). Indeed, under the present law, no warranty of or covenant for title is implied by the mere conveyance,

(*z*) See Sug. V. & P. 574; Davidson, Prec. Conv. 192, 261, n. (*o*), 4th ed.; 1 Dart, V. & P. 616.

(*a*) *Browning* v. *Wright*, 2 B. & P. 13, 22; *Church* v. *Brown*, 15 Ves. 258, 263; *Blakesley* v. *Whieldon*, 1 Hare, 176, 181; Sug. V. & P. 574; 1 Dart, V. & P. 615—617, 621; Davidson, Prec. Conv. vol. i. 118, 203, n. (*b*); vol. ii. pt. i. 191, 205, 214, 215, 4th ed.; Wms. Real Prop. 448, 13th ed.; 589, 19th ed.

(*b*) Above, p. 34.

(*c*) See note (*a*), above. For this reason, if the conveyance as prepared on the purchaser's behalf purport to assure the land to be held by him "free from incumbrances," the vendor should strike out these words, as they might import an unrestricted warranty at common law that the lands were free from incumbrances: see *Expte. Stanford*, 17 Q. B. D. 259, 271.

(*d*) *E.g.*, no such warranty of title as is implied by the modern law on the sale of goods: see Benjamin on Sales, 511—523, 2nd ed.; Wms. Pers. Prop. 523, 15th ed.

(*e*) *Clare* v. *Lamb*, L. R. 10 C. P. 334.

on sale or otherwise, of any land (*f*); except only in the case of a demise for a term of years (*g*), and in certain cases of statutory conveyance where the word *grant* by force of some Act of Parliament implies covenants for title (*h*). But, as we have seen, on an executory agreement to sell land the vendor is bound to show a good title (*i*); and if one agree to buy land and be let into possession on payment of the purchase money and the vendor's title prove defective before the execution of a conveyance, the purchaser can recover the price paid as upon a total failure of consideration, for the contract was not then completed (*j*). And this appears to be the case, notwithstanding that the title had been accepted (*k*); unless the purchaser had expressly agreed to accept such a title as exposed him to the risk attendant on the defect and the title contracted for had been duly shown to him (*l*). If, moreover, one induce another to buy land by untruthfully representing himself to be the freeholder in fee or absolute owner thereof, the purchaser will be entitled to relief on the ground of the misrepresentation and according as it were innocent (*m*) or fraudulent (*n*); the difference being that either an innocent or a fraudulent misrepresentation of this kind will be a

No warranty of title now implied, as a rule, by the conveyance of land.

False representation by vendor that he is the owner of the land sold.

(*f*) Co. Litt. 384a and note (1); stat. 8 & 9 Vict. c. 106, s. 4; *Clare* v. *Lamb*, ubi sup.; *Debenham* v. *Sawbridge*, 1901, 2 Ch. 98, 100.

(*g*) See Wms. Real Prop. 592, 593, 19th ed.; *Budd-Scott* v. *Daniell*, 1902, 2 K. B. 351; *Jones* v. *Lavington*, 1903, 1 K. B. 253.

(*h*) See Wms. Real Prop. 592, 19th ed.

(*i*) Above, pp. 27, 75 *sq.*

(*j*) *Johnson* v. *Johnson*, 3 B. & P. 162.

(*k*) See *S. C.; Re Haedicke and Lipski's Contract*, 1901, 2 Ch. 666; and above, pp. 144, 145.

(*l*) See above, pp. 163—168.

(*m*) *Bree* v. *Holbech*, 2 Doug. 654; *Wilde* v. *Gibson*, 1 H. L. C. 605, 633; Selborne, C., *Brownlie* v. *Campbell*, 5 App. Cas. 925, 935—938; *Joliffe* v. *Baker*, 11 Q. B. D. 255; *Derry* v. *Peek*, 14 App. Cas. 337; *Onward Building Society* v. *Smithson*, 1893, 1 Ch. 1, 12; *Debenham* v. *Sawbridge*, 1901, 2 Ch. 98; see also *Rudd* v. *Lascelles*, 1900, 1 Ch. 815, 818.

(*n*) *Edwards* v. *M'Leay*, G. Coop. 308, 2 Swanst. 287; *Hart* v. *Swaine*, 7 Ch. D. 42, as to which see *Brownlie* v. *Campbell* and *Joliffe* v. *Baker*, ubi sup.; *Derry* v. *Peek*, 14 App. Cas. 337, 365, 366, 371—374.

good ground for rescinding or avoiding the specific performance of the contract while it remains uncompleted, but only a fraudulent misrepresentation will give rise to an action of deceit, or to a claim to set aside the conveyance after completion.

Sale by trustee as such.

If the vendor sold as a trustee, he cannot be required to give the usual vendor's covenants for title, but can only be called upon to covenant that he has done no act to incumber the property sold (*o*). But if a trustee enter into a contract to sell land, without disclosing his fiduciary character, the purchaser will, it is thought, be entitled to the same covenants as if the vendor were the beneficial owner (*p*). This should not be forgotten when it is desired to effect a sale by trustees without disclosing the trust. So a mortgagee selling as such under his power of sale is only bound to covenant that he has not incumbered (*q*), but would, it is thought, be liable to give the usual vendor's covenants as to title if he sold under an open contract. Where land held on a simple trust or in mortgage is sold by or by the direction of the *cestui-que-trust* or the mortgagor or other person entitled to the equity of redemption, he must enter into the vendor's covenants for title, and the trustee or mortgagee concurring in the sale is only bound to covenant against his own incumbrances. And on a sale by mortgagor and mortgagee, it is the invariable practice to insert or incorporate in the conveyance the usual qualified covenants for title by the mortgagor, notwithstanding that these appear to supersede and to deprive the purchaser of the benefit of the absolute covenants for title entered into by the mortgagor on the occasion of the mortgage (*r*). If land be sold by a trustee in

By mortgagee as such.

By *cestui-que-trust* or mortgagor.

By trustee in bankruptcy.

(*o*) Above, p. 575, n. (*y*).
(*p*) Above, p. 575.
(*q*) Davidson, Prec. Conv. vol. ii. pt. i. 296, n., 4th ed.
(*r*) Davidson, Prec. Conv. vol. ii. pt. i. 261, n., 293, n. (*e*), 4th ed.; 1 Key & Elph. Prec. Conv. 485, 4th ed.: 461, 7th ed.

bankruptcy professedly selling as such under the power of sale given to him by statute (*s*), he can only be required to covenant that he has done no act to incumber. It has, however, been the practice to require the bankrupt himself to concur in the conveyance and to covenant for title: but this cannot be insisted on, and the bankrupt's covenants are of little or no value (*t*). Where lands are sold by or by the direction of one entitled to some estate therein, with the intention that they shall be conveyed under some power exercisable by himself or by others with his consent (such as the power of sale given to a tenant for life by the Settled Land Act, 1882 (*u*), or the power of sale usually limited before that Act to the trustees of real settlements to be exercisable with the tenant-for-life's consent), he is bound to enter into the usual covenants for title (*x*). But where such person is tenant for life only and his covenants for title extend to the acts, &c. of any of his predecessors in title (*y*), it is the regular practice to limit these covenants by a proviso saving him from liability, as regards the remainder or reversion expectant on his life estate, for any other acts or defaults than those of himself or his own heirs or persons claiming under or in trust for him or them (*z*). And it would probably be held, where the nature of the interest of a tenant for life so selling or consenting to a sale appears from the contract, that he is entitled to insist on this restriction of his liability. But it is thought that this is not the case where he has sold as absolute owner. Thus, if one so entitled sold by an open contract, which he proposed to carry out by

Sale under power.

(*s*) Stat. 46 & 47 Vict. c. 52, s. 56.

(*t*) Sug. V. & P. 575; 1 Dart, V. & P. 624; Davidson, Prec. Conv. vol. ii. pt. i. 618 and n., 4th ed.; 1 Key & Elph. Prec. Conv. 533 and n., 4th ed.; 503 and n., 7th ed.

(*u*) Above, pp. 307 *sq.*

(*x*) *Re London Bridge Acts*, 13 Sim. 176, 179; *Poulett* v. *Hood*, L. R. 5 Eq. 115; *Re Sawyer and Baring's Contract*, 53 L. J. Ch. 1104; Sug. V. & P. 575.

(*y*) Above, p. 576.

(*z*) 1 Dart, V. & P. 619, 620; Davidson, Prec. Conv. vol. ii. pt. i. 261, n. (*o*), 262, 4th ed.; 1 Key & Elph. Prec. Conv. 453, n., 4th ed.; 426, n., 7th ed.

a conveyance by himself under the Settled Land Act, 1882, or by trustees under a power of appointment exercisable with his consent (*a*), it is submitted that he would be bound to give vendor's covenants for title unrestricted by any such proviso. As we have seen (*b*), this point may be of extreme importance on a sale under the Settled Land Acts. If lands be vested in trustees on a special trust for sale, and they sell as such trustees, their receipts being good discharges (*c*), it does not appear that the purchaser is in strict right entitled to require the persons beneficially interested in the purchase money to join in the conveyance or to covenant for title (*d*): but it has been the practice of conveyancers to insist, if such persons were absolutely entitled and *sui juris*, that they should give the usual vendor's covenants for title as regards their shares (*e*). It is, however, usual on sales by trustees to stipulate expressly that the concurrence of the beneficiaries shall not be required and the purchaser shall be entitled to no other covenant than the trustees' covenant against incumbrances (*f*). Where lands belonging to one absolutely are sold by order of the Court, he must enter into the same covenants for title as if he himself sold them; but where on such a sale the legal estate is in trustees and a good title to the equitable interest is given by virtue of the order for sale (*g*), the purchaser cannot require the concurrence in the conveyance of the persons beneficially entitled, or oblige them to covenant for title (*h*).

Sale by order of the Court.

(*a*) Above, pp. 131, 291, 307 *sq.*

(*b*) Above, pp. 333, 334.

(*c*) Above, p. 297.

(*d*) See *Cottrell* v. *Cottrell*, L. R. 2 Eq. 330; above, p. 578; and next note.

(*e*) Sug. V. & P. 574; 1 Dart, V. & P. 617, 618; Davidson, Prec. Conv. vol. ii pt. i. 275, n., 4th ed.; Wms. Real Prop. 449, 13th ed.; 589, 19th ed.

(*f*) 1 Davidson, Prec. Conv. 613, 4th ed.; 1 Key & Elph. Prec. Conv. 264, n., 4th ed.; 248, n., 7th ed.

(*g*) Above, p. 415.

(*h*) Sug. V. & P. 574; *Cottrell* v. *Cottrell*, L. R. 2 Eq. 330; 1 Dart, V. & P. 617; Davidson, Prec. Conv. vol. ii. pt i. 270—275 and notes, 4th ed. It is usual, however, so to stipulate: 1 Davidson, Prec. Conv. 661, 4th ed.; 593, 5th ed.

The statutory covenants for title.

The present practice is to incorporate the requisite covenants for title or covenant against incumbrances (*i*) in conveyances on sale by using the expressions which cause such covenants to be "deemed to be included and to be implied" therein by virtue of the Conveyancing Act of 1881. By this Act (*j*), in a conveyance (*k*) for valuable consideration, other than a mortgage (*l*), there are implied on the part of anyone, who conveys and is expressed to convey as beneficial owner, as regards the property expressed to be conveyed by him, and with the person or persons to whom the conveyance is made, covenants for right to convey, quiet enjoyment, freedom from incumbrances and further assurance, and in the case of leaseholds, for validity of the lease; all limited to the acts, omissions and sufferances of the person who so conveys, anyone conveying by his direction and anyone through whom he derives title otherwise than by purchase for value (not here including a conveyance in consideration of marriage), and persons claiming under him or them (*m*). And the like covenants are implied in a similar conveyance, in which it is expressed that one conveys by direction of another directing as beneficial owner, on the part of the person so directing (*n*). And

(*i*) Above, pp. 575, 576, 578.

(*j*) Stat. 44 & 45 Vict. c. 41, s. 7 (1) (a), (b). This section applies only to conveyances made after the year 1881: sect. 7 (8).

(*k*) In this section "conveyance" includes a deed conferring the right to admittance to copyhold or customary land; but does not include any other customary assurance, or a demise by way of lease at a rent: sect. 7 (5).

(*l*) In a conveyance by way of mortgage, absolute covenants for title are implied on the part of any one, who conveys and is expressed to convey as beneficial owner: sect. 7 (1) (c), (d). And in a conveyance by way of settlement there is implied on the part of any one who conveys and is expressed to convey as settlor a covenant for further assurance limited to himself and every person deriving title under him subsequently to that conveyance: sect. 7 (1) (e).

(*m*) Due exceptions are made with regard to any estates, interests, or incumbrances, subject whereto the conveyance is *expressly* made, and the acts, &c. of persons claiming in respect thereof.

(*n*) Sect. 7 (2). And by sect. 7 (3), where a wife conveys and is expressed to convey as beneficial owner and her husband also conveys and is expressed to convey as beneficial owner, there are implied, besides the covenants implied as above mentioned by the use of these expressions, the same covenants as if the wife conveyed by the direction of the

in any conveyance there is implied a covenant against incumbrances by anyone who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition or under an order of the Court, such covenant extending to the conveying party's own acts only (*o*). But no covenant is implied in any conveyance by virtue of this Act where it is not expressed that some person conveys in one of the characters particularly mentioned in the Act; for instance, as beneficial owner or as trustee (*p*). The covenants implied by virtue of this Act may be varied or extended by deed (*q*). They may therefore, it is considered, be limited in any manner which will not altogether destroy the covenantor's personal liability. A proviso destroying altogether a covenantor's personal liability on the covenant is held to be repugnant and void (*r*). An instance of the limitation of the statutory covenants for title occurs in the proviso usually inserted in conveyances where the party covenanting for title is a tenant for life only (*s*). The benefit of a covenant implied by virtue of this Act shall be annexed and incident to and go with the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested (*t*). This is analogous to the law laid down with respect to express covenants for title. These run with the land; that is to say, they are enforceable by every one, who takes the covenantee's estate therein (*u*), or any part thereof (*w*). But they are not enforceable

husband directing as beneficial owner, and also covenants by the husband in the same terms as the covenants implied on the part of the wife: see Wms. Conv. Stat. 87—91.

(*o*) Sect. 7 (1) (f).

(*p*) Sect. 7 (4).

(*q*) Sect. 7 (7).

(*r*) *Williams* v. *Hathaway*, 6 Ch. D. 544, 546.

(*s*) Above, p. 579.

(*t*) Sect. 7 (6).

(*u*) Co. Litt. 314 b, 385 a; *Middlemore* v. *Goodale*, Cro. Car. 503; *Campbell* v. *Lewis*, 3 B. & A. 392; Sug. V. & P. 576 *sq.*

(*w*) Farwell, J., *Rogers* v. *Huse-*

by one who acquires the land, but does not take the covenantee's estate therein. Thus if A. conveyed land to B. and his heirs to such uses as C. should appoint and in default of appointment to the use of C. and his heirs and covenanted with C. for title, and C. afterwards *appointed* the land to the use of D. and his heirs, D. could not sue on the covenants for title, for he took an estate which defeated C.'s estate in the land (*x*). Although if C. had conveyed to D. his *estate* in the land, D. could have sued on the covenants for title. D. could also have sued on the covenants, if they had been made (as they should have been) with B., the grantee to uses; because then D. would, by virtue of the Statute of Uses (*y*), have taken the covenantee's estate in the land; and this would be the case, whether he had taken by appointment or grant from C. (*z*). Where the statutory covenants for title are employed, the implied covenantee is the person to whom the conveyance is made (*a*). This, in cases where the conveyance is made to uses intended to be executed by the Statute of Uses (*y*), is the grantee to uses; so that if the limitations of the conveyance include a power of appointment, an appointee thereunder will take the implied covenantee's estate and so be enabled to sue upon the covenants for title. But it appears equally true in principle of the statutory as of the express covenants for title that one cannot sue thereon, as assignee of the land to which they relate, unless he take the implied covenantee's estate therein.

Covenants for title on sale of an equitable estate.

If covenants for title were given upon the sale of an equitable estate, as of an equity of redemption, an assignee of the purchaser's estate could not maintain an

good, 1900, 2 Ch. 388, 396; 9 Jarm. Conv. by Sweet, 366, 404; 2 Dart, V. & P. 779, 5th ed.; *Twynam* v. *Pickard*, 2 B. & A. 105.

(*x*) *Roach* v. *Wadham*, 6 East, 289; Sug. V. & P. 578—580.

(*y*) Stat. 27 Hen. VIII. c. 10.

(*z*) Sug. V. & P. 578.

(*a*) Above, p. 581.

action at law upon the covenants in his own name, for there being no legal estate with which the covenant could run, he was regarded in law as a stranger to the covenant (*b*). It appears however that he might maintain an action at law in the name of the original covenantee, or his representatives, who would in equity be bound to allow his or their name to be used for the purpose. For in equity the benefit of the covenants for title would, in accordance with the manifest intention of the parties, run with the purchaser's estate in the land (*c*). But where the statutory covenants for title are given in the conveyance on sale of an equitable estate, it appears that an assignee of the purchaser's estate may well maintain an action at law in his own name upon the covenants, since the right of action thereon is by force of the above-mentioned provisions of the Conveyancing Act (*d*) annexed to the implied covenantee's estate or interest in the land conveyed to him; and it is thought that the right of action on the covenants is effectually so annexed to the covenantee's estate, whether his interest be legal or equitable.

Covenants for title obtained by fraud.

If on a conveyance of land covenants for title, express or statutory, be obtained by fraud, the covenantor may well plead the fraud, in avoidance of the contract, in any action brought against him on the covenants by the original covenantee. But if the covenantee assign over his estate in the land to a purchaser for value without notice of the fraud, the assignee will be entitled, as such, to enforce the covenants; and the covenantor will no longer be enabled to set up the plea of fraud (*e*).

(*b*) Sug. V. & P. 581; 9 Jarm. Conv. by Sweet, 366; *Onward Building Society* v. *Smithson*, 1893, 1 Ch. 1, 12.

(*c*) See *Spencer* v. *Boyes*, 4 Ves. 370; *Riddell* v. *Riddell*, 7 Sim. 529, 533, 535; *Rogers* v. *Hosegood*, 1900, 2 Ch. 388, 404; Sug. V. & P. 592, 593.

(*d*) Stat. 44 & 45 Vict. c. 41, s. 7 (6); above, p. 582.

(*e*) *David* v. *Sabin*, 1893, 1 Ch. 523, overruling the *dictum* to the contrary in *Onward Building*

Purchaser may take either express or the statutory covenants for title.

It seems to lie in the purchaser's option whether the covenants for title, which he is entitled to demand, shall be given by express words in the old form or by incorporation in the conveyance of the statutory covenants; for the purchaser is in general the arbiter of the form of the conveyance (*g*). But, as we have seen (*h*), the practice is to take the statutory covenants. If, however, the statutory covenants implied by the vendor's conveyance as beneficial owner would impose upon him any more extensive covenant than the contract obliges him to give, he will of course be entitled to have the operation of the statute duly restricted (*i*). Thus it has been already mentioned that a tenant for life not bound to covenant against the acts of the remaindermen or reversioners may so limit his liability (*k*). Again, we have seen (*l*) that a vendor is bound to covenant for title against his own acts and the acts of all his predecessors in title subsequent to the last sale of the land or other dealing therewith for value whereon proper covenants for title were given. But the statutory covenants are against the conveying party's own acts and the acts of all persons through whom he derives title otherwise than by purchase for value not including the consideration of marriage (*m*). If, therefore, the vendor derive title under a marriage settlement whereon proper covenants for title were given (*n*), it appears that

Society v. *Smithson*, 1893, 1 Ch. 1, 13; see below, pp. 1053, 1054.

(*g*) Above, pp. 546, 551, 552. The same principle appears applicable in determining whether any other rights, to which the purchaser is entitled, shall be assured to him in express terms or by some statutory form; *e.g.*, whether express general words shall be inserted, or recourse had to the statute; above, pp. 561, 562.

(*h*) Above, p. 581.

(*i*) Above, p. 563.

(*k*) Above, p. 579.

(*l*) Above, p. 576.

(*m*) Above, p. 581.

(*n*) It was the practice before the year 1882 for the settlor in a marriage or family settlement to give covenants for title qualified in the same manner as upon a sale: Davidson, Prec. Conv. vol. iii. 59, 275, 634, 861, 1027, 1120, 3rd ed.; Williams on Settlements, 126, 226. But since the Conveyancing Act of 1881 took effect, settlors have in many cases given only the covenant for further assurance implied under that Act by their conveying as settlor: above, p. 581, n. (*m*);

in strict law he will not be bound to covenant for title against the acts of the settlor, and will be entitled to have the statutory covenants modified accordingly (*o*). In practice, however, vendors claiming under marriage settlements whereon proper covenants for title were given have frequently submitted to covenant against their settlors' acts (*p*).

Covenants for title on sale on copyholds.

On the sale of a legal estate in copyholds, the covenants for title must be given by a deed separate from the conveyance of the land, which will of course be by surrender and admittance (*q*); as the covenants cannot be entered on the court rolls. This may be accomplished by a deed either preceding or following the surrender. In the former case the deed takes the form of a covenant by the vendor to surrender the copyholds to the purchaser's use and the covenants for title are added; in the latter case the deed contains only the covenants for title. The latter course was formerly considered preferable, because it was doubted whether in the former case the covenants would run with the land, the covenantee having no legal interest therein previously to the surrender (*r*). It should be noted that the statutory covenants for title can only be incorporated in a deed conferring the right to admittance to copyhold land (*s*); so that if it be preferred to take the surrender before the covenants for title are entered into, they must be given by express words in the old form. As the right of action on the statutory

2 Key & Elph. Prec. Conv. 461, n., 562, 563, 704, 710, 4th ed.; 459, n., 549, 550, 664, 670, 7th ed.; Davidson's Concise Precedents, 511 and n., 521, 17th ed.

(*o*) Sug. V. & P. 574; 9 Jarm. Conv. by Sweet, 375; Davidson, Prec. Conv. vol. ii. pt. i. 192, 237, n., 243, n., 254, n., 261, n., 4th ed.

(*p*) See 1 Dart, V. & P. 545, 5th ed.; 616, 6th ed.

(*q*) Wms. Real Prop. 470 *sq.*, 19th ed.

(*r*) Above, pp. 582—584; *Riddell* v. *Riddell*, 7 Sim. 529; Davidson, Prec. Conv. vol. ii. pt. i. 205—207, 364, 367, 4th ed.

(*s*) Stat. 44 & 45 Vict. c. 41, s. 7 (5); above, p. 581, and n. (*l*).

covenants for title is expressly given to every person in whom is vested the whole or any part of the estate or interest of the implied covenantee, and it appears immaterial whether that estate were legal or equitable (*t*), there seems to be no doubt that, where such covenants are given by a deed of covenant to surrender copyholds upon a sale thereof, the purchaser's assigns will be enabled to sue at law upon the covenants. For this reason the usual course now is for the purchaser to take the statutory covenants for title upon the sale of copyholds, incorporating them in a deed of covenant to surrender the land to his use (*u*).

Where the land sold is to be conveyed subject to any incumbrance.

As has been already mentioned (*x*), where land is sold subject to some definite incumbrance, legal or equitable, whether it be a mortgage, charge, lease, easement, *profit à prendre*, restrictive covenant or other liability, it is proper to express in the conveyance that the land is conveyed subject to the incumbrance. And the vendor must be particularly careful to see that this is done, where the incumbrance was created by himself or some one, against whose acts he is bound to covenant for title (*y*), and it is proposed to incorporate the statutory covenants for title. For these include covenants for right to convey, quiet enjoyment, and freedom from incumbrance, subject only to estates or interests subject whereto the conveyance was *expressly* made (*z*). So that in such cases unless the incumbrance, subject to which the land was sold, be expressly mentioned, the statutory covenants for title will in terms extend to guarantee indemnity against it; although the conveyance will only pass the vendor's actual interest in the land (*a*). The incumbrance diminishing the estate granted to the

(*t*) Above, p. 584.
(*u*) 1 Key & Elph. Prec. Conv. 475 and n., 4th ed.; 451, 7th ed.
(*x*) Above, p. 567.
(*y*) Above, pp. 576, 585.
(*z*) See stat. 44 & 45 Vict. c. 41, s. 7 (1); above, pp. 576, 581, n. (*m*).
(*a*) Above, p. 569.

purchaser must therefore be exactly specified in the conveyance. If this were inadvertently omitted, the vendor would have no remedy against an action on the covenants but to claim rectification of the conveyance (*b*). On the other hand, if land, to which the vendor's title is defective, be sold, or accepted by the purchaser, with the stipulation that the vendor shall by his covenants for title guarantee indemnity against the risk of the defect, and the defect appear on the face of the conveyance, it must be plainly shown, where the statutory covenants for title are applicable and are relied on, that they are intended to cover the defect; otherwise it might be contended that the defect, being an incumbrance subject to which the conveyance was expressly made, did not come within the terms of the covenants. Of course, if in this or any other case the usual qualified covenants for title do not cover defects or possible defects of title, against which the vendor is by the contract of sale bound to guarantee indemnity, the statutory covenants for title must be modified accordingly or else, which is the better plan, the required covenants for title must be given in express terms duly showing the intention of the parties (*c*). Where covenants for title are particularly intended to guard against a known defect of title, which is not necessarily apparent, it is better that they should be contained in a deed separate from the conveyance; as it would not generally be desirable to show the defect on the face of the conveyance (*d*). In such case express covenants must be given, as the statutory covenants can only be incorporated in a deed of conveyance: but the statutory covenants might be given in the conveyance to prevent attention being attracted by their absence, and it might be provided in the separate

Covenants for title intended to cover an apparent defect.

(*b*) Above, p. 568.

(*c*) See *Page* v. *Midland Rail. Co.*, 1894, 1 Ch. 11, 20; *May* v. *Platt*, 1900, 1 Ch. 616; 2 Dart, V. & P. 886, 887.

(*d*) Sug. V. & P. 573.

deed that the covenants thereby given were intended to be additional.

Purchaser agreeing to observance of restrictions on the use of the land bought must enter into an absolute covenant to that effect.

In certain circumstances the vendor can require the purchaser to enter into some covenant with him by the deed of conveyance. Thus, if the contract for sale provide for the observance of certain restrictions on the use of the land sold, the purchaser is bound, on completion, to enter into a covenant to observe the restrictions (*e*); and in the absence of stipulation to the contrary, this covenant must be absolute, and the purchaser cannot insist that his liability thereunder shall be limited in any way, as by a proviso that he shall be released from liability if he re-sell the land and procure the new purchaser to enter into a similar covenant (*f*). If the parties intend that the benefit of any such restrictive covenant shall run with some particular land retained by the vendor, he should be careful that the covenant is so expressed that no doubt can arise as to the persons who will be entitled to enforce the covenant. It is, as we have seen (*g*), a question to be decided on consideration of all the circumstances and conditions of the sale whether the intention of the contracting parties was that the benefit of such a covenant should run with some particular land belonging to the vendor, or whether this benefit was meant to be confined to the vendor himself, his personal representatives, and his assigns of the benefit of the covenant. The purchaser can of course only be called upon to covenant as intended by the contract. If the contract do not in effect provide that the benefit of the covenant shall run with some particular land of the vendor's, the purchaser cannot be obliged to covenant in such a manner that

(*e*) See above, pp. 428, 571, 572.

(*f*) See *Pollock* v. *Rabbits*, 21 Ch. D. 466, decided on an express condition; but it is thought that the stipulation implied by law is the same.

(*g*) Above, pp. 427, 428, 571.

the vendor's heirs and assigns of that land will be entitled as such, and not merely as assignees from the vendor of the benefit of the covenant, to enforce the covenant (*h*).

In what cases the purchaser is bound to indemnify the vendor.

When the vendor is bound under any covenant or contract to pay any money or do or observe any other act or thing in respect of the land sold or as the condition of retaining his interest therein, and the land is sold to be held by the purchaser on the same terms as the vendor held it, but the vendor will remain personally liable for any future breach of the covenant or contract, which may occur after the sale and conveyance of the land, the purchaser is bound on completion to enter into a covenant with the vendor promising to observe all the conditions on which it is intended that he shall hold the land and to indemnify the vendor against all liability in respect of any future breach of these conditions; and it is not necessary for the vendor to stipulate expressly in the contract for sale that the purchaser shall enter into such a covenant (*i*). For example, on the sale of leaseholds, which are subject to the payment of rent and the performance of onerous covenants, the purchaser must, if the vendor will remain under any liability in respect of the rent and covenants, covenant in the deed of conveyance thenceforth to pay the rent and perform the covenants and to indemnify the vendor against all liability by reason of any future omission to pay the rent or keep the covenants. The purchaser must therefore give this indemnity, where the vendor is the original lessee, or an assignee who has entered into a similar

On sale of leaseholds.

(*h*) See *Renals* v. *Cowlishaw*, 9 Ch. D. 125, 129, 11 Ch. D. 866; *Spicer* v. *Martin*, 14 App. Cas. 12, 24; *Rogers* v. *Hosegood*, 1900, 2 Ch. 388, 396, 403—408.

(*i*) See *Pember* v. *Mathers*, 1 Bro. C. C. 52, 54; *Waring* v. *Ward*, 7 Ves. 332, 337; *Staines* v. *Morris*, 1 V. & B. 8; *Wilkins* v. *Fry*, 1 Mer. 244, 263—266; *Moxhay* v. *Inderwick*, 1 De G. & S. 708; Sug. V. & P. 37, 38, 198; 1 Dart, V. & P. 628 *sq.*

covenant on the assignment to himself, or the executor or administrator of such lessee or assignee (*k*). If however the vendor will not remain liable, after the assignment of the leaseholds to the purchaser, for any future failure to pay the rent or keep the covenants, as where he is the original lessee's trustee in bankruptcy or is an assignee of the lease who did *not* covenant to indemnify his assignor generally against the rent and covenants, he cannot require the purchaser to covenant to indemnify him (*l*). Where on a sale of leaseholds the vendor is bound to pay the rent and perform the covenants in the lease up to the proper time for completion, as is the case under an open contract (*m*), it is thought that the purchaser cannot be required to enter into such a covenant as would extend to indemnify the vendor against past breaches of covenant (*n*). And it is submitted that in such case the purchaser cannot safely enter into a covenant of indemnity in the common form, which has been hitherto usual (*o*); for this, it seems, might be held to oblige him to indemnify the vendor against past breaches of covenant (*p*): but he

(*k*) See previous note.

(*l*) See *Wilkins* v. *Fry*, 1 Mer. 244, 263—266; Sug. V. & P. 37, 38; 1 Dart, V. & P. 630; Davidson, Prec. Conv. vol. ii. pt. i. 217, 4th ed. Note that the assignee's liability independent of express contract to indemnify the original lessee (as to which see *Burnett* v. *Lynch*, 5 B. & C. 589; *Moule* v. *Garrett*, L. R. 5 Ex. 132, 7 Ex. 101) extends only to omission to pay the rent or keep the covenants during his own tenancy, and not to any such omission occurring after he has assigned over: Sug. V. & P. 38.

(*m*) Above, pp. 352 *sq.*

(*n*) This is further apparent from the fact that the covenants for title, which the vendor is bound to give, include a covenant that the rent has been paid and the covenants performed; see above, p. 575.

(*o*) Davidson, Prec. Conv. vol. ii. pt. i. 419, 4th ed.; 1 Key & Elph. Prec. Conv. 434, 7th ed.

(*p*) See *Gooch* v. *Clutterbuck*, 1899, 2 Q. B. 148, where the covenant was not exactly in the common form: but the construction placed upon it certainly throws doubt upon the construction of the common form, which is not expressed with unmistakable accuracy. Some of the reasons given for the decision in this case appear questionable: but it may be supported on the ground that the breach of the covenant to repair was a continuing breach and the assignee covenanting to perform the covenants as from the date of the

should insist on his liability being expressly limited to indemnity against future omission to pay the rent and keep the covenants. If, however, the purchaser bought with notice of some breach of covenant and agreed to take the property subject to the breach, then, it is thought, his covenant to indemnify the vendor ought to include indemnity against the consequences of that breach. For example, where buildings held under a repairing lease are out of repair and are sold to a purchaser, who has notice of the actual condition of the premises, on the terms that he shall take them as they are and the vendor shall not be obliged to put them in repair before completion, the purchaser must, it is submitted, covenant to indemnify the vendor against all liability for the existing breach of the covenant to repair (*q*) as well as against any future omission to pay the rent or keep the covenants (*r*).

Indemnity on sale of land subject to restrictive covenants.

When freehold or copyhold land affected by restrictive covenants is sold subject to the covenants, the question of the purchaser's liability to covenant to indemnify the vendor depends, it is submitted, on the principle above stated (*s*), the same as prevails in the case of the leaseholds. If the vendor will remain liable, after the

assignment came under an immediate duty to perform the covenant to repair, and he could not discharge this duty without remedying the whole breach of the covenant. Thus his failure to remedy the continuing breach, which occurred after the assignment, made him indirectly liable to indemnify the vendor against a breach of covenant which had occurred before it.

(*q*) The judgments given in *Re Highett and Bird's Contract*, 1903, 1 Ch. 287, are opposed to this view: but it is submitted that those judgments were delivered under a mistaken apprehension of the law: see above, p. 354.

(*r*) Apparently a covenant of indemnity in the common form would effect this object, where the breach is continuing, for the reason given in the previous note. But if the breach were not continuing the common form could not be relied on. Where the vendor covenants for title in the usual way, it seems impossible to construe the common form of purchaser's covenant as extending to past breaches of covenant.

(*s*) Above, p. 590.

conveyance, under any covenant or contract previously made by him, for the future omission to observe the restrictions, the purchaser must covenant to indemnify him; otherwise not. And it is submitted that this principle is properly applicable, whether the vendor or the purchaser seek to enforce the contract (*t*). Thus the vendor will be entitled to be indemnified where he was a party to the contract, which originally imposed the restrictions, or where he bought from one liable to observe the restrictions and covenanted with him to observe the restrictions and to indemnify him against all future breaches thereof. But if the vendor were no party to the contract creating the restrictions and acquired the land subject to the restrictions without himself contracting to observe them or to indemnify his grantor against their non-observance (*u*), there is no reason for calling upon the purchaser to indemnify him. It is conceived that these results follow, when land is sold subject to restrictive covenants, although the contract for sale do not expressly provide for any covenant being made by the purchaser. But in consequence of the present state of the authorities (*x*), it is desirable for a vendor who is selling land subject to restrictive covenants, and will remain liable for the failure to observe them, to stipulate expressly that the purchaser shall covenant to observe the restrictions and indemnify him against any future omission to observe

(*t*) See *Moxhay* v. *Inderwick*, 1 De G. & S. 708; *Lukey* v. *Higgs*, 1 Jur. N. S. 200. There are *dicta* in the judgments in these cases leading to the conclusion that, where land is expressly sold as being subject to restrictive covenants, but without an express stipulation that the purchaser shall observe the covenants, the purchaser cannot enforce the specific performance of the contract without entering into a covenant with the vendor to observe the restrictions; but if specific performance be sought by the vendor, the purchaser cannot be obliged to enter into such a covenant: see Sug. V. & P. 38. But it is submitted that Mr. Dart's criticism of these *dicta* (1 Dart, V. & P. 631—633) is correct; that the distinction so suggested is unsound; and that the true principle is that stated in the text. And see 1 Davidson, Prec. Conv. 563, 678, n. (*n*), 4th ed.

(*u*) See above, p. 590.

(*x*) See last note but one.

them (*y*). Where lands were sold subject to a covenant not to erect thereon any buildings other than those of a particular kind and also subject to "proper provisions for securing the due observance and performance" of the covenant, it was held that the vendor was entitled to have inserted in the conveyance a power of re-entry, exercisable within the period of certain existing lives and twenty-one years after, in case of any breach of the covenant, for the purpose of pulling down any buildings erected in breach of the covenant, and holding the lands until reimbursed all expenses of so doing; but was not entitled to have a term of years or a rent-charge limited to a trustee for the purpose of securing the performance of the covenant (*z*). This was so decided in consequence of the express stipulation for proper provisions for securing the performance of the covenant; and, without such stipulation, a vendor selling lands subject to restrictive covenants cannot insist on the insertion in the conveyance of any proviso for re-entry on breach of the covenant.

Indemnity on sale of land subject to a charge for which the

So where land is sold subject to some charge, which the vendor will after conveyance remain personally liable to pay, the purchaser is bound to covenant to

(*y*) In *Moxhay* v. *Inderwick*, 1 De G. & S. 708, it was held that the purchaser should covenant to observe the restrictions for the future, without further covenanting to indemnify the vendor against any breach thereof. An absolute covenant to observe the restrictions, without any further covenant of indemnity, is perfectly sufficient for the vendor; for any breach of the restrictions will be an immediate cause of action on the covenant: whereas on a mere covenant to indemnify against any breach of the restrictions there would be no cause of action until the covenantee suffered some damage in consequence of a breach of the restriction: see *Saward* v. *Anstey*, 2 Bing. 519; *Lethbridge* v. *Mytton*, 2 B. & Ad. 772; *Antrobus* v. *Davidson*, 3 Mer. 569; *Padwick* v. *Stanley*, 9 Hare, 627; *Lloyd* v. *Dimmack*, 7 Ch. D. 398; *Hughes-Hallett* v. *Indian, &c. Co.*, 22 Ch. D. 561. But it appears that a covenant to indemnify the vendor would be implied from a covenant to observe the restrictions: *Hornby* v. *Cardwell*, 8 Q. B. D. 329. It seems, therefore, that the vendor is entitled to have an express covenant for indemnity: see above, pp. 564, 565, 572.

(*z*) *Expte. Ralph*, De G. 219.

indemnify the vendor against all liability for its non-payment; as where a mortgagor sells the equity of redemption of the mortgaged land (*a*), or land is sold subject to a rent-charge which the vendor has, either on its original creation or on his own purchase of the land, covenanted to pay (*b*), or an estate in remainder liable to succession duty is sold (*c*).

vendor will remain liable.

Where land is sold in consideration of a rent-charge to issue thereout either for life or in fee, the vendor is entitled to require that the rent shall be secured to him, not only by charging the same on the land sold, but also by the purchaser's personal covenant for payment (*d*). The vendor is also entitled to have an express power of distress limited to him, that being of the essence of a rent-charge (*e*). It is questionable, however, whether he is entitled, in the absence of express stipulation, to have the rent-charge further secured by a power in default of payment to re-enter and hold the land until the arrears of the rent and all costs be satisfied (*f*): although it has long been usual, on conveyance of land in consideration of a rent-charge, to reserve such a power (*g*). But a stipulation that the rent-charge should be secured by "proper provisions" would certainly entitle the vendor to have the same secured by such a right of entry (*h*). The vendor is not entitled, without express stipulation, to have reserved to him a power in default of payment of

Sale in consideration of a rent-charge.

(*a*) *Waring* v. *Ward*, 7 Ves. 332, 337; Sug. V. & P. 198; 1 Dart, V. & P. 629; Davidson, Prec. Conv. vol. ii. pt. i. 453 and n. (*d*), 4th ed.

(*b*) 1 Dart, V. & P. 631; see above, p. 384.

(*c*) Above, pp. 202, 208, 214; 1 Dart, V. & P. 629.

(*d*) *Bower* v. *Cooper*, 2 Hare, 408; 1 Dart, V. & P. 634; Davidson, Prec. Conv. vol. ii. pt. i. 509, n., 4th ed.

(*e*) See Wms. Real Prop. 417, 19th ed. This is none the less so that a remedy by distress was given for rent seek by stat. 4 Geo. II. c. 28, s. 5.

(*f*) See *Expte. Ralph*, De G. 219.

(*g*) Davidson, Prec. Conv. vol. ii. pt. i. 508 and n., 4th ed.; Wms. Real Prop. 337, 13th ed.; 423, 424, 19th ed.

(*h*) *Expte. Ralph*, De G. 219.

the rent to limit a term to a trustee on trust to raise the arrears by sale or otherwise (*i*). And if no such express stipulation were made in the contract of sale, and the remedies for recovering the rent-charge are to be reserved, as is now usual, by tacit incorporation in the conveyance of the 44th section of the Conveyancing Act of 1881 (*k*), the purchaser should be careful to insert a proviso modifying the operation of that enactment in accordance with his rights under the contract, and excluding the power to limit a term, which the statute would otherwise confer (*l*). The vendor is not entitled, in the absence of express stipulation, to have a power limited to him in default of payment of the rent to re-enter on the land and hold the same as his own.

Sale partly in consideration of an agreement by the purchaser to build.

Where land is sold partly in consideration of an agreement by the purchaser to erect buildings thereon, it is thought that, unless the contract otherwise provide, the vendor is only entitled to have the purchaser's covenant to erect the buildings (*m*). It is therefore desirable for the vendor to insert in such a contract an express stipulation that he shall, in default of due performance of the covenant, have a power of re-entry and holding the land until the covenant be performed, such power to be exercisable within a period not exceeding the limits of the rule against perpetuities; and it is sometimes advisable to make such a stipulation where it is agreed that the purchaser shall observe restrictions on the use of the land sold (*n*). But it seems that a stipu-

(*i*) See *Expte. Ralph*, De G. 219; Davidson's Concise Precedents, 201, n. (*b*), 17th ed.

(*k*) Stat. 44 & 45 Vict. c. 41; see Wms. Real Prop. 421, 424, 19th ed.; Wms. Conv. Stat. 216, 217.

(*l*) Davidson's Concise Precedents, 201, n. (*b*), 17th ed.

(*m*) See above, pp. 572, 589.

(*n*) It is not equally necessary in all cases, as the burden of restrictive covenants will in equity run with the land, and they may be enforced by action for injunction against any one acquiring the land with notice thereof; while covenants to build are only enforceable by action at law on the covenant against the covenantor personally and his representatives in law; see above, pp. 426 *sq.*

lation that the performance of the covenants shall be secured "by proper provisions" will entitle the vendor to have such a power of re-entry reserved to him (*o*).

Whether the usual remedies for securing a rent-charge in fee are void for remoteness.

An express power of distress granted either in terms or by the operation of the 44th section of the Conveyancing Act of 1881 (*p*) is certainly not obnoxious to the rule against perpetuities. Such a power is, as we have seen, of the essence of a rent-charge; it merely confers by express grant the same remedy as is annexed to rent service at common law and now by statute to rent seck (*q*); it creates no separate future interest in the land apart from the rent; and it has been known to the law and always treated as unquestionably valid from Littleton's time (*r*) onward (*s*). It is submitted that the better opinion is that a right reserved on the creation of a rent-charge in fee for the owner of the rent, his heirs and assigns to enter on the land charged in default of payment of the rent at any time and to hold the same until the arrears of the rent and all expenses shall be satisfied out of the rents and profits is not void for remoteness, although its exercise be not confined to the duration of existing lives and twenty-one years after; and that this is the case whether such right of re-entry be created by direct reservation or by means of the Statute of Uses. For it has always been considered that such a power of entry, being given by way of remedy only for recovery of the rent, is merely a part of the estate which the grantee of the rent has in the rent limited to him; the power passes by a grant of the rent as incident thereto, whereas if it had been an inde-

Power of re-entry to satisfy arrears.

(*o*) See *Expte. Ralph*, De G. 219.

(*p*) Stat. 44 & 45 Vict. c. 41.

(*q*) Above, p. 595, n. (*e*).

(*r*) Litt. ss. 216—218.

(*s*) The writer is not aware that its validity has ever been attacked: but in view of the modern extension of the rule against perpetuities, and the alarm inspired thereby amongst the weaker brethren, he has thought it worth while to state the reasons for maintaining the validity of such a power.

pendent interest or condition it would have been inalienable at common law, and the heir alone and no assign of the grantee could have made use of it (*t*); and it gives only a right of seizure and temporary occupation, which does not divest the estate of the terre-tenant (*u*), and confers no more than an interest to take the profits in the nature of a distress (*x*). The right created by such a power appears, therefore, not to be an interest, independent of the rent, to arise at a future time in the land out of which the rent issues, and so not to fall within the class of future interests in land which must conform with the rule against perpetuities (*y*). And it is submitted that there is no occasion, on conferring such a power of entry in connexion with the creation of a rent-charge in fee, to confine the possible exercise thereof within the term of some existing lives and twenty-one years after (*z*). There appears to be no doubt, however, that a power given to the owner of a rent-charge in fee, in case of non-payment of the rent-charge at any time, to limit an *absolute* term of years to a trustee on trust to raise the arrears by sale or mortgage

Power to limit a term.

(*t*) *Havergill* v. *Hare*, Cro. Jac. 510; see Wms. Real Prop. 329, 357, 392, 19th ed.; Sug. Pow. 43, 44.

(*u*) The rent-owner entering under such a power may indeed demise the land, but can only confer on the tenant an interest co-extensive with his own, that is to say, determinable on payment or satisfaction of all arrears: see Litt. s. 327; *Havergill* v. *Hare*, Cro. Jac. 510; *Jemmot* v. *Cooly*, 1 Lev. 170.

(*x*) Co. Litt. 203 a.

(*y*) See Third Report of Real Property Commissioners, 37; Sug. Gilb. Uses, 178, 179; Lewis on Perpetuities, 618; Gray, Rule against Perpetuities (Boston, 1886), § 303, p. 216; and observe that the practice sanctioned by the most eminent conveyancers has long been to limit such powers of entry as security for the payment of a rent-charge in fee without confining the time of their possible exercise within the period allowed by the rule against perpetuities and without expressing any doubt as to their validity: Davidson, Prec. Conv. vol. ii. pt. i. 508 and n., 4th ed; Wms. Real Prop. 337, 13th ed.; 1 Key & Elph. Prec. Conv. 335, n., 603, 4th ed.; Davidson's Concise Precedents, 199, 17th ed.

(*z*) The opposite course is now recommended in 1 Key & Elph. Prec. Conv. 321, n., 442, 569, 7th ed. It is submitted, however, that notwithstanding the case of *Re Hollis' Hospital and Hague*, 1899, 2 Ch. 540, the better opinion as to the law and proper practice is that expressed in the authorities referred to in the previous note.

thereof, is invalid; for the creation of such a term would confer an interest in the land charged, which would not be determinable on payment or satisfaction of the arrears of the rent (*a*); and such a future interest, capable of existing independently of the rent must, it is thought, be limited to arise within the time allowed by the rule against perpetuities or it will be void (*b*). If, therefore, use be made of the 44th section of the Conveyancing Act, 1881 (*c*), on the creation of a rent-charge in fee, care must be taken to confine the possible exercise of the power of limiting a term therein mentioned (if this power be not altogether excluded (*d*)) to the period of the duration of some existing lives or life and twenty-one years after. With regard to the limitation, on the conveyance of land in consideration of a rent-charge in fee to issue thereout, of a power for the grantee of the rent, his heirs and assigns to enter in case of non-payment of the rent at any time and thenceforth to hold the land charged in fee as his or their own, if such a power is reserved by way of shifting use, as it must be to enable the grantee's assigns to take advantage of it (*e*), it will be void unless limited to the time allowed by the rule against perpetuities (*f*). And so will a like power of entry limited by way of shifting use to arise on breach of covenant (*g*). In either case the power is quite different from a power annexed to a rent to enter and satisfy arrears; for a power to enter and hold the land absolutely defeats altogether the

Power of re-entry by way of forfeiture.

(*a*) See above, p. 598, n. (*u*).

(*b*) Such a power, it must be remembered, could not be conferred by any common law disposition, but could only be created under the law of shifting use or executory devise: see Wms. Real Prop. 366 *sq.*, 19th ed.

(*c*) Stat. 44 & 45 Vict. c. 41, which is thought to confer no greater power of limiting a term than the landowner has without it.

(*d*) Above, p. 596.

(*e*) See Litt. ss. 325, 347, 348; Co. Litt. 201, 214, 215; Butler's notes to Co. Litt. 203 a, b; above, p. 598, and n. (*t*).

(*f*) Third Rep. of Real Prop. Commrs. 37; *Re Hollis' Hospital and Hague*, 1899, 2 Ch. 540, 549.

(*g*) Above, p. 596.

estate given subject to the power (*h*), the event in which the power is to be exercisable being a cause of forfeiture of that estate. As to conditions of entry limited on gifts of land at common law to the donor and his heirs, they were in use and were considered to be perfectly valid long before the rule against perpetuities was heard of (*i*), and the opinion of the Real Property Commissioners was that, although these conditions came within the *policy* of the modern rule against perpetuities, their validity was not affected by that rule, as it then existed (*j*). Recently, however, the opinion has been judicially expressed that a common law condition of re-entry annexed to a grant of land in fee is invalid unless the event, in which the power of entry is to arise, must occur within the time allowed by the rule against perpetuities (*k*). If, then, on sale of land in consideration

(*h*) See above, p. 598.

(*i*) Litt. s. 325; Co. Litt. 201, 202.

(*j*) See their Third Report, pp. 29, 36, 37. Their opinion was and it was long considered by very eminent lawyers that the rule against perpetuities related only to future interests created by way of shifting use or executory devise: see Wms. Real Prop. 276, 277, 319 *sq.*, 13th ed.; Davidson, Prec. Conv. vol. iii. pt. i. 336, 3rd ed.

(*k*) North, J., *Dunn* v. *Flood*, 25 Ch. D. 629; Baggallay, L. J., *S. C.*, 28 Ch. D. 592; *Re Hollis' Hospital and Hague*, 1899, 2 Ch. 540. In the former case the opinions expressed were *obiter dicta;* and according to the report the power of entry was created by covenant only and in favour of the vendors, without mentioning their heirs and assigns. If this be correct there could have been no objection on the score of perpetuity; for the power of entry would only have been exercisable by the vendors themselves in their lifetime. In the latter case the point was not precisely determined. It was a vendor and purchaser summons raising the question whether it was an objection to title that the land sold was subject to a common law condition of reverter to a former owner's heir in an event which might occur at an unlimited time after the creation of the condition. Byrne, J., expressed the opinion that the condition was void, but decided that the title was too doubtful to be forced on an unwilling purchaser, since the person who would be entitled under the condition (which if valid would have come into effect on the conveyance completing the sale) was no party to the proceedings and threatened litigation against the purchaser. The learned judge must therefore have considered that it was reasonably open to doubt whether the person entitled in case of the validity of the condition had not a good cause of action It should be noted that the opinion of the Real Property Commissioners (3rd Rep. p. 37) was not cited in either of these cases. Byrne, J., in the latter case, admitted that there was no authority on the point and simply adopted the view maintained in

of a rent-charge and a covenant to build or to observe restrictive covenants, the vendor stipulate for the reservation of a right of re-entry by way of forfeiture on non-payment of the rent or breach of covenant, such right of entry must, if it is to be extended to the vendor's assigns, be created by way of shifting use and must therefore be limited to arise within some lives or life in being and twenty-one years after (*l*). And in the present state of the law it would be unwise to create a common law condition of re-entry without limiting the time of its possible exercise in the same way. And it is thought that this is equally the case where land is sold partly in consideration of the performance of building or restrictive covenants and it is stipulated that the performance of the covenants shall be secured by a power of re-entry and holding till performance of the covenants (*m*). In this case also it appears that a right for the vendor's assigns to re-enter can only be secured by a shifting use (*n*); and as the right to enforce a building covenant can confer no interest in the land to be built on, and the right to enforce a restrictive covenant is merely an equitable interest in

Power on breach of covenant to enter and hold until performance thereof.

Lewis on Perpetuities, 616, saying that, except in Challis on Real Property, 174—177, 2nd ed., he could find no definite statement of a contrary opinion. It is submitted that on such a question the opinion of the Real Property Commissioners is of greater weight than that of Mr. Lewis. But of course, as Mr. Justice Byrne well pointed out, instancing the analogous progress of the law as to contracts in restraint of trade, the boundaries of the rule against perpetuities have been of late considerably extended, and several interests which formerly were only within the *policy* of the rule have been drawn definitely within the ambit of the rule itself: see *London and South Western Rail. Co.* v. *Gomm*, 20 Ch. D. 562; *Re Frost*, 43 Ch. D. 246; Wms. Real Prop. 395—405, 19th ed. If, however, covenants for the perpetual renewal of leases are to be considered as outside the rule because their validity was established before the modern development of the perpetuity rule (and it is submitted that their exception cannot be well founded on any other principle: see an article by the writer in 42 Sol. J. 628), surely common law conditions, which are of much greater antiquity, might be allowed a similar immunity.

(*l*) Above, p. 599.

(*m*) Above, p. 596. See Davidson, Prec. Conv. vol. ii. pt. 511 and n., 4th ed.; 1 Key & Elph. Prec. Conv. 335, n., 467, 604, 4th ed.; Davidson's Concise Precedents, 204 and n., 17th ed.

(*n*) See above, p. 599.

the land thereby affected (*o*), it does not appear to be maintainable that a right of re-entry of this kind is a part of the estate of the person entitled to enforce the covenant; which is, as we have seen (*p*), the ground on which a like power of entry annexed to a rent is asserted to be valid, though unlimited as to time.

Delivery of the title deeds on completion.

Another matter which may be conveniently discussed in connection with the preparation of the conveyance is the delivery to the purchaser of the title deeds or other muniments of title, and the vendor's duty to give or procure proper statutory acknowledgments of right to production and undertakings for safe custody of any documents of title lawfully retained in the possession of the vendor himself or any other person. The general rules governing this matter upon a sale by open contract have been already stated (*q*). The vendor is bound, in the absence of special stipulation, to deliver over to the purchaser on completion all documents of title, which are or should rightly be in his own possession and relate solely to the property purchased, whatever be their date and whether abstracted or not (*r*). The documents, which must be so handed over, include not only the title deeds and such other muniments of title as will pass without express mention by a conveyance of the land itself (*s*), but also all documents produced for the purpose of verifying the abstract in proof of any fact stated therein; such as certificates of baptism, marriage or burial, statutory declarations as to matters of pedigree or as to the identity of the property sold, or certificates of the result

(*o*) Above, pp. 426 *sq.*

(*p*) Above, p. 597.

(*q*) See above, pp. 29, 38, 39.

(*r*) Sug. V. & P. 407; 2 Dart, V. & P. 762.

(*s*) See *Harrington* v. *Price*, 3 B. & Ad. 170; *Philips* v. *Robinson*, 4 Bing. 106; *Re Williams and Newcastle's Contract*, 1897, 2 Ch. 144, 148; Wms. Pers. Prop. 124, 15th ed.

of an official search for judgments or other matters (*t*). But of course documents, such as a marriage settlement, merely produced to show that they do not affect the land sold (*u*) cannot be required to be given up to the purchaser. It appears that in general the vendor is not obliged to hand over the receipts for payments made on account of any of the death duties (*v*); for although these may be evidence (especially in the case of succession duty) that a charge of duty on the land sold has been satisfied, they are principally evidence of the discharge of the person who made the payment from a personal liability or accountability to the Crown, and on this ground he appears to be entitled to retain them. But it seems that any written statement or certificate (such as may be given in the case of estate duty (*x*)) of the Inland Revenue Authorities, which merely purports to show that the land sold is discharged or free from any lien or claim for some particular death duty, ought to be delivered up to the purchaser. As we have seen (*y*), the Vendor and Purchaser Act, 1874, provides that, in the absence of stipulation to the contrary, where the vendor retains any part of an estate to which any documents of title relate, he shall be entitled to retain such documents (*z*). It has been held that, as this Act relates only to sales of land, this enactment only applies where the vendor retains some land or interest in land, to which the documents of title relate; so that where a mortgage had been made of land together with policies of insurance on the mortgagor's life, and the mortgagee sold the land under his power of sale, but not the policies, it was decided that the mortgagee was bound to hand over the mortgage deed to the purchaser (*a*). This case appears to have

Re Williams and Newcastle's Contract.

(*t*) See above, pp. 115, 124—126, 533.
(*u*) See above, p. 107.
(*v*) Above, pp. 198 *sq.*
(*x*) See above, pp. 235, 248.
(*y*) Above, p. 38.
(*z*) Stat. 37 & 38 Vict. c. 78, s. 2, rule 5.
(*a*) *Re Williams and Newcastle's Contract*, 1897, 2 Ch. 144.

been argued and decided solely upon the construction of the enactment quoted: but it is submitted that the matter ought rather to have been referred to the principle contended for before the Vendor and Purchaser Act was passed, namely, that where a title deed of any land sold relates also to other property of the vendor, he should be at liberty to retain it (*b*); and that the intention of the Act was merely to declare the law in cases where the vendor retained some *land* and not to legislate for cases in which he retains some personal chattels to which the deed in question is also a title deed. Suppose that land and personalty were vested in trustees by one deed of settlement, the land being settled on trust for sale, would the trustees be obliged on a sale of the land to hand over the deed of settlement to the purchaser? It is thought not. But if this opinion be right, it must rest on the abovementioned principle; as it does not appear that the fact, that the trustees have duties to perform under the deed, is of itself sufficient to justify their retaining it. For where land alone is settled on trust for sale and the trusts of the purchase money are declared by the same deed, it is considered that the trustees are not entitled to retain the deed of settlement on a sale of all the land (*c*); and for this reason it is the practice to declare the trusts of the purchase money by a deed separate from the conveyance on trust for sale (*d*). But in any case where land has been settled along with personal chattels by the same deed either upon trust for or with power of sale, and in any other case in which some title deed of land sold relates also to personal chattels retained by the vendor, he should be careful, so long as the decision in *Re Williams and Newcastle* is not overruled,

(*b*) 2 Dart, V. & P. 618, 4th ed.; Wms. Pers. Prop. 11, 11th ed.; 125, 15th ed.

(*c*) 2 Dart, V. & P. 763.

(*d*) Davidson, Prec. Conv. vol. iii. 59, 857, 3rd ed.; Williams on Settlements, 125.

to stipulate expressly that he shall retain it. It does not appear that a vendor, who is not retaining any land to which the title deeds relate, is entitled to retain them on the ground that he has entered into a covenant to produce them: but in such case, as the vendor will remain under a personal liability, the purchaser must covenant to perform the obligations which were so undertaken by the vendor and to indemnify him against their non-performance (*e*). If the vendor should prior to the sale have given a statutory acknowledgment and undertaking with regard to any document of title, that is of course no reason for retaining it; as the acknowledgment imposes no personal liability and the undertaking imposes no liability on the undertaker after he has parted with the possession or control of the document (*f*). The vendor is of course not bound to obtain and hand over any documents of title lawfully remaining in the possession of any other person than himself; as where he himself has no more than a right to their production under a statutory acknowledgment or a covenant, or where the documents are in the possession of a mortgagee of other land, or a mortgagee who is not to be paid off.

Vendor, who has covenanted to produce the deeds.

Vendor who has given a statutory acknowledgment and undertaking.

Where lands held under one title are put up for sale in lots, without any special stipulation as to the custody of the title deeds, it is considered that, if all the lots be sold, the title deeds should be delivered to the purchaser of the largest part in value of the lands (whether that part be contained in one lot or several lots), and that he should give statutory acknowledgments and undertakings to the other purchasers (*g*). If and so long as any lot

Sale of land in lots.

(*e*) Sug. V. & P. 434, 435; Dart, V. & P. 633, 763; Davidson, Prec. Conv. vol. ii. pt. i. 664, n., 4th ed.; see above, p. 590.

(*f*) Stat. 44 & 45 Vict. c. 41, s. 9 (2), (9).

(*g*) See *Griffiths* v. *Hatchard*, 1 K. & J. 17, 18; Sug. V. & P. 34; Dart, V. & P. 162, 762, 763; 1 Davidson, Prec. Conv. 147, 589, 4th ed.

remain unsold, the vendor will be entitled to retain the deeds (*h*). But it is usual and proper on a sale by auction of land in lots to make special stipulations to the like effect; and these generally provide that the deeds shall, after all the lots shall have been sold, whether at the auction or afterwards, be delivered to the purchaser of the largest part in value of the lands sold (*i*).

Vendor's duty to furnish statutory acknowledgments and undertakings.

As we have seen (*k*), the vendor is, as a rule, bound to furnish the purchaser with proper statutory acknowledgments and undertakings for the production and safe custody of any title deeds or other muniments of title which may lawfully be withheld from the purchaser on completion, and are necessary to make a good title according to the contract. This rule, it will be observed, does not oblige the vendor to furnish any acknowledgment or undertaking with regard to any document of title dated prior to the time fixed by law or agreed upon for the commencement of title. The rule is, moreover, subject to two important exceptions. First, it does not apply to documents in public or official custody or other documents, not being in the vendor's possession or power, of which the purchaser can always obtain good evidence for himself (*l*). It does not therefore apply to deeds of bargain and sale enrolled, or to copies of court roll not remaining in the vendor's possession or power: but where the vendor retains any copies of court roll

What documents should be included in a statutory acknowledgment.

(*h*) Above, p. 603.

(*i*) 1 Davidson, Prec. Conv. 621, 638, 644; Davidson's Concise Precedents, 120, 17th ed.; 1 Key & Elph. Prec. Conv. 315, 7th ed. Note that if it be stipulated that the purchaser of the *largest lot* shall have the deeds, the purchaser of the lot largest in area will be entitled to them: *Griffiths* v. *Hatchard*, 1 K. & J. 17; and under a condition giving the custody of the deeds to the purchaser of the largest *lot* in value, they will go to the purchaser of the one lot which has fetched the highest price, not to the purchaser of other lots, which have together realised a larger sum: *Scott* v. *Jackman*, 21 Beav. 110.

(*k*) Above, pp. 29, 39.

(*l*) Above, p. 39, and n. (*b*).

forming part of the abstracted title, he must give an acknowledgment and undertaking with regard to them (*m*). It is strange that it is not settled whether the probate of a will or letters of administration forming part of the title should be included in an acknowledgment for production (*n*). Of course an unproved will of realty only (*o*) should; for that remains in private custody. And it seems that, on a sale of leaseholds, the probate of a will or letters of administration forming part of the title, should, if retained by the vendor, be included in the acknowledgment; as the probate, or an exemplification thereof, and not the original will, is the only proper evidence of the will, and the letters are the proper evidence of the administrator's title (*p*). It appears too that whenever executors as such have taken an interest in or exercised a power over the land sold, as under the Land Transfer Act, 1897, or Lord St. Leonards' Act (*q*), the probate of the will, being the proper evidence of their appointment, ought, if retained, to be included in the acknowledgment; and this is equally true with regard to the letters of administration in the case of an administrator. And it may be contended that, since the probate of a will has been made admissible evidence of a devise of realty (*r*), it ought always to be the subject of an acknowledgment and undertaking, where it forms part of the title and is retained. As we have seen (*s*), however, office copies of wills and letters of administration are accepted as good evidence on a sale; and office copies of wills may be put in evidence in Court to prove a devise of realty under

(*m*) *Cooper* v. *Emery*, 1 Ph. 388.

(*n*) It is submitted that, on a sale of land by the executor of a will, or by an administrator, he is entitled to retain the probate or letters of administration, which it is necessary that he should have until he has fully administered: cf. above, p. 604.

(*o*) Above, pp. 127, 128.

(*p*) Above, p. 127, n. (*d*); Taylor on Evidence, §§ 425, 1589, 9th ed.; 2 Wms. Exors. 1889, 7th ed.

(*q*) Above, pp. 187, 193.

(*r*) Above, p. 127, n. (*d*).

(*s*) Above, pp. 121, 127.

the same conditions as the probates may (*t*). For these reasons, perhaps, it has not been the general practice to include probates or letters of administration in a covenant or an acknowledgment for production of documents of title: but it is submitted that a claim for their inclusion could not be successfully resisted (*u*). And it is not usual in practice to include in acknowledgments copies (whether attested, certified, official or otherwise) of any documents, or certificates of baptism, marriage or burial, or receipts of payment of any death duties (*u*); although, as regards office copies and receipts for succession or estate duty retained by the vendor, this seems hardly to conform with the principle laid down by the Court (*x*).

Statutory declarations.

Statutory declarations, which the vendor would be bound to hand over if they related solely to the land bought, should, if retained by him, be the subject of an acknowledgment. The purchaser cannot require any acknowledgment for production of a document produced merely to prove that it does not affect the property sold, unless it be in the vendor's own possession or power (*y*).

Where the purchaser will have the legal

Secondly, where any documents forming part of the title contracted for are not in the vendor's possession,

(*t*) See stat. 20 & 21 Vict. c. 77, ss. 62, 64.

(*u*) See *Cooper* v. *Emery*, 1 Ph. 388: Davidson, Prec. Conv. vol. ii. pt. i. 663, 664, n., 4th ed.; 1 Key & Elph. Prec. Conv. 457, n., 4th ed.; 431, n., 7th ed.

(*x*) *Cooper* v. *Emery*, 1 Ph. 388. Of documents of which office copies are issued, a purchaser can of course obtain as good evidence himself, and copies of receipts for payments of death duties will be issued by the authorities to persons applying in good faith and in proper circumstances: Davidson, Prec. Conv. vol. ii. pt. i. 662, n., 4th ed. But where such office copies or receipts remain in the vendor's possession or power, on what principle can he decline to give an acknowledgment for their production? The usual practice certainly appears unjustifiable on principle in the case of receipts for succession duty or certificates of discharge of estate duty; for these are good original evidence of the discharge of a lien on the land and remain in private and not official custody. It is submitted that any official statement in writing, or certificate purporting solely to declare that the land sold together with other land is free or discharged from all claim of duty (see above, p. 603), ought certainly to be included in an acknowledgment.

(*y*) Sug. V. & P. 436; 2 Dart, V. & P. 764.

right to enforce an existing covenant or acknowledgment for production.

but he is entitled at law to the benefit of a covenant or statutory acknowledgment for their production, and the legal right to enforce this covenant or acknowledgment will pass to the purchaser on completion, the purchaser is not entitled to demand that a fresh covenant or acknowledgment shall be procured for him from the person in possession of the documents; for that would confer upon him no better right than he will have without it: but he is entitled, if the deed of covenant or the acknowledgment by which this right is conferred may be withheld from him, to have a statutory acknowledgment for the production of that document (*z*). Here it may be observed that the benefit of a covenant to produce title deeds will run at law with the covenantee's lands, to which the deeds relate: but it is now considered that the burden thereof does not run at law with the lands retained by the covenantor (*a*). It is thought, however, that in equity the covenantor's successors in title to the deeds (other than purchasers for value without notice of the covenant) would be affected by the duty of production; for this seems to resemble a restriction on the free use of the deeds rather than an obligation positively affirmative, such as a liability to lay out money (*b*). And it appears that, where the ownership of any land held under one title is divided, whether by sale, settlement or otherwise, and the title deeds remain in the possession of the owners of a part, the owners of the rest of the land have an equitable right, independently of any covenant, to enforce production of the title deeds in order to defend

(*z*) See Sug. V. & P. 453, n.; *Gabriel* v. *Smith*, 16 Q. B. 847, 852—854, 861, where note that the vendor had only the benefit of covenants for production of the bulk of the title deeds, but that the objection made was that there were two title deeds of which he had not and the purchaser would not have the benefit of a covenant for production.

(*a*) See Farwell, J., *Rogers* v. *Hosegood*, 1900, 2 Ch. 388, 394—396.

(*b*) See *Austerberry* v. *Oldham*, 29 Ch. D. 750; Sug. V. & P. 453 and n.

their title or effect any sale or like disposition of their lands (*c*). It is thought, however, that this right, like any other equity, may be lost, if the deeds come to the hands of a purchaser for value who has acquired a legal interest in them in good faith without notice of the right. But the fact that the purchaser will on completion have this equitable right to production of the title deeds does not prevent him from claiming an acknowledgment for their production; he is entitled to have secured to him either the *legal* right to enforce a covenant for production or the benefit of an acknowledgment (*d*). The vendor is therefore bound to procure such covenant or acknowledgment for the purchaser, if he can; and must, it is thought, use his best endeavours to do so (*e*). But if these fail, then by the Vendor and Purchaser Act, 1874 (*f*), the inability of the vendor to furnish such covenant or acknowledgment will not be an objection to the title, if the purchaser will, on the completion of the contract, have an equitable right to the production of the documents. Where the purchaser will have neither the benefit of a good statutory acknowledgment or legal covenant for the production of the title deeds, nor any equitable right to obtain their production, it is thought that he may decline to complete the contract; unless of course the case has been duly provided for by special stipulation.

Vendor must, as a rule, give both acknowledgment and undertaking.

It is considered that in any case in which a vendor would, according to the law in force before the Con-

(*c*) See as to a purchaser of part, *Fain* v. *Ayers*, 2 S. & S. 533; as to joint tenants, tenants in common, and co-parceners, Sug. V. & P. 443; *Lambert* v. *Rogers*, 2 Mer. 489; *Elton* v. *Elton*, 6 Jur. N. S. 136; *Shore* v. *Collett*, G. Coop. 234 (after partition); as to remaindermen, *Lempter* v. *Pomfret*, 1 Dick. 238; *Davis* v. *Dysart*, 20 Beav. 405; and see Sug. V. & P. 442—445, 453 and n.

(*d*) See *Barclay* v. *Raine*, 1 S. & S. 449; Sug. V. & P. 452, 453, n.; *Gabriel* v. *Smith*, 16 Q. B. 847, 861.

(*e*) See *Day* v. *Singleton*, 1899, 2 Ch. 320.

(*f*) Stat. 37 & 38 Vict. c. 78, s. 2, rule 3.

veyancing Act, 1881 (*g*), be bound to give an unqualified covenant for the production and safe custody of title deeds (*h*), he is now bound to give a statutory acknowledgment and undertaking for the same purposes. And if he propose to do this, he is not bound to enter into a covenant in the old form; for by that Act (*i*) an acknowledgment shall satisfy any liability to give a covenant for production and delivery of copies of any documents, and an undertaking shall satisfy any liability to give a covenant for safe custody of documents (*k*). If, therefore, a man sell land under an open contract or apparently as beneficial owner, he is bound to furnish the purchaser not only with proper statutory acknowledgments, but also with proper statutory undertakings with regard to any documents of title (except as above mentioned (*l*)) which may rightly be withheld from the purchaser. But if a man sell as trustee or as mortgagee, it is thought that he will be bound to give an acknowledgment only (*m*): although it is advisable (*n*) for trustees and mortgagees selling as such to stipulate expressly that they shall not be required to give the statutory undertaking. It should be particularly noted that only the person who *retains possession* of documents

Proper acknowledgment and undertaking

(*g*) Stat. 44 & 45 Vict. c. 41.

(*h*) See Sug. V. & P. 452; 1 Dart, V. & P. 555, 5th ed.; 1 Davidson, Prec. Conv. 222, n. (*t*), 223, 592, 4th ed.; Wms. Conv. Stat. 97, 102.

(*i*) Sect. 9 (9), (11).

(*k*) A vendor is apparently at liberty to covenant absolutely for production and safe custody in the old form, if he will; for his *liability* is to give such a covenant, though that liability may be satisfied by his giving an acknowledgment and undertaking. But the statutory acknowledgments and undertakings are better for both parties than the covenants in use under the old practice. The giver obtains the limitation of his liability to the time during which he has possession or control of the documents; and the receiver gets the benefit of the statutory obligation running with the documents at law: see stat. 44 & 45 Vict. c. 41, s. 9 (2), (9); above, p. 609.

(*l*) Above, pp. 606—608.

(*m*) *Re Agg-Gardner*, 25 Ch. D. 600; Davidson's Concise Precedents, 30, 658, n., 17th ed.

(*n*) The reason is that, under the old practice, trustees used to covenant for safe custody: though it was considered doubtful whether they were obliged to do so; see Davidson, Prec. Conv. vol. i. 222, n. (*t*), 223, 592, 613; vol. ii. pt. i. 667, and n. (*a*), 670, 4th ed.

can only be given by the person retaining possession of the documents.

Sale by mortgagor with mortgagee's concurrence.

is capable of giving a proper acknowledgment for their production and undertaking for their safe custody, which will have the right statutory effect (*o*). Thus, if a mortgagor sell part of the mortgaged lands, proposing to convey the same with the concurrence of the mortgagee, who will of course retain possession of the title deeds, the mortgagee is the only person who can give a valid statutory acknowledgment and undertaking with respect to them, and the mortgagor cannot do so. The mortgagee does not, as a rule, object to give the acknowledgment; but it is objectionable to him to give the undertaking, which involves a personal liability. The mortgagor's liability to covenant or undertake for safe custody is therefore properly satisfied, not by his purporting to give a statutory undertaking (*p*), but by his covenanting that he will give a statutory undertaking when the documents shall come into his possession, and that in the meantime, until such undertaking shall be given, the possessor of the documents shall keep them safe, whole, uncancelled and undefaced, unless prevented from doing so by fire or other inevitable accident (*q*). And it is thought that the mortgagor is bound to give such a covenant, in the absence of stipulation to the contrary, the regular practice in this case prior to the Conveyancing Act, 1881, having been for the mortgagor to covenant both for production and safe custody of the title deeds (*r*). It would be very unreasonable in such

(*o*) See stat. 44 & 45 Vict. c. 41, s. 9; *Re Pursell and Deakin's Contract*, 1893, W. N. 152.

(*p*) If he were to do so, that would apparently create a contract at common law fixing him with an absolute liability for the safe custody of the deeds, without the exception of fire and inevitable accident: see *Expte. Stanford*, 17 Q. B. D. 259, 271. But such an undertaking would not have the statutory effect: not even if the deeds should afterwards come into the undertaker's possession.

(*q*) This is the duty imposed by a statutory acknowledgment; stat. 44 & 45 Vict. c. 41, s. 9 (9).

(*r*) Davidson, Prec. Conv. vol. ii. pt. i. 318, n. (*d*), 321, n. (*e*), 4th ed.; *Re Pursell and Deakin's Contract*, 1893, W.N. 152. The mortgagor's liability is to give an absolute covenant for safe custody: but it is more beneficial to both parties that he

a case for the mortgagee to refuse to give an acknowledgment, which involves him in no personal liability: but the purchaser could not, of course, compel him to do so, if he were no party to the contract (*s*). The mortgagor would, as we have seen, be bound to use his best endeavours to procure an acknowledgment from the mortgagee: but if the mortgagee, though willing to concur in the conveyance, should persist in refusing to give an acknowledgment, the purchaser would, it appears, be obliged to accept the title. For he would, it is thought, have an equitable right against the mortgagee, as being a party to the conveyance to him, to production of the title deeds for all proper purposes (*t*). In such case, however, the purchaser should require the vendor to covenant that he will give a proper statutory acknowledgment, as well as undertaking, with regard to the title deeds, when they shall come into his possession, and also for production and safe custody of the deeds in the meantime (*u*). Here it may be observed that a person in constructive possession of documents of title appears capable of giving an effectual acknowledgment and undertaking with regard to them; so that where title deeds remain in the possession of solicitors as bailees for safe custody only, their owner can nevertheless enter into a statutory acknowledgment and undertaking for their production and safe custody. It is not equally

Person in constructive possession of documents.

should covenant to give an undertaking and for safe custody in the meantime: see above, p. 611, n. (*k*).

(*s*) In such cases the mortgagee is usually under no contract with the mortgagor, and can refuse to join in the conveyance except on his own terms or on being paid off altogether. It is submitted that the suggestion made in 1 Key & Elph. Prec. Conv. 461, n. (*e*), 7th ed., that a mortgagee not fully paid off and retaining the title deeds by virtue of his mortgage is bound to give an acknowledgment is not warranted by the authorities cited (*Yates* v. *Plumbe*, 2 Sm. & Giff. 174; 1 Dart, V. & P. 766); for in that case the mortgagees were retaining the deeds, not only in right of their mortgage, but also and chiefly as owners of a larger estate of which the mortgaged lands formed part, and it was as such owners that they were held liable to covenant for production.

(*t*) Above, pp. 609, 610; Davidson, Prec. Conv. vol. ii. pt. i. 321, n. (*c*), 4th ed.

(*u*) Above, p. 612.

clear that this is the case where the documents are in the possession of solicitors who have a lien upon them for their charges: but it is submitted that a man retains possession of documents within the meaning of the 9th section of the Conveyancing Act of 1881 (*x*), where the documents are in the custody of his solicitors as bailees for him, notwithstanding that his solicitors have the usual solicitors' lien thereon for their charges. And having regard to the nature of solicitors' lien on their clients' title deeds (*y*), it certainly appears that where a vendor's solicitors, who act for him generally in the matter of the sale, have the custody of the title deeds, apparently on his behalf alone, and produce them for the purchaser's inspection and approve on the vendor's behalf of a conveyance or an agreement containing a statutory acknowledgment and undertaking by the vendor with regard to them, without insisting on or giving notice of any lien thereon, they must be taken to have waived their lien as regards the creation of the rights conferred by the acknowledgment and undertaking (*z*). The regular practice is to take acknowledgments and undertakings from the owners of any documents retained, and not from their solicitors (*a*).

Acknowledgment, whether to be given by separate document.

According to the old practice, a covenant for production of title deeds was usually taken by a separate deed and not contained in the conveyance, unless the

(*x*) Stat. 44 & 45 Vict. c. 41.

(*y*) See Wms. Pers. Prop. 60, 61, 15th ed.

(*z*) It is thought that they would be estopped by their conduct from setting up any lien thereon.

(*a*) There appears to be no doubt that a simple bailee of documents has such a possession thereof as enables him to give an effectual statutory acknowledgment and undertaking, if authorized to do so by the bailor. Whether he can do so without the bailor's authority and whether a wrongful possessor of documents can do so are nice questions: but the statute, in the case of an undertaking at least, certainly appears to empower one who has the lawful possession, but only a limited ownership of title deeds (such as a tenant for life), to impose a greater liability on his successors in interest than he could otherwise impose by virtue of his own interest in the deeds.

deeds to be included therein were recited or noticed in the conveyance (*b*). And it is thought that this practice may still be usefully followed as regards statutory acknowledgments and undertakings (*c*). Where these relate only to documents recited or noticed in the conveyance, it appears more convenient that they should be contained therein. It was always desirable under the old practice, where title deeds were retained and covenanted to be produced, to obtain an endorsement on the leading title deed of a memorandum of the covenant in order to affect all persons claiming thereunder with notice thereof (*d*): but it was considered that this could not be insisted on, if not provided for by special stipulation (*e*). There is not the same necessity for this in the case of a statutory acknowledgment and undertaking, as these are by force of the statute enforceable at law against all persons who have or may come into possession or control of the documents (*f*), whether they have or have not notice thereof. Where, however, a purchaser is obliged to rely on his equitable right to the production of any documents of title (*g*), it is very material for him to obtain, if he can, the endorsement of a memorandum of the conveyance to himself on the leading title deed withheld from him; for he might lose this right if the legal right to the documents were to come to a purchaser for value taking in good faith without notice of the equity (*h*). But it is considered that, in the absence of special stipulation, a purchaser has no right to require such an endorsement to be made (*i*).

Endorsement of memorandum on conveyance.

(*b*) Sug. V. & P. 450; 1 Dart, V. & P. 554, 5th ed.; Davidson, Prec. Conv. vol. ii. pt. i. 288, n. (*h*), 319, n. (*a*), 4th ed.

(*c*) 1 Dart, V. & P. 626; Davidson's Concise Precedents, 128 n., 17th ed.; Wolstenholme's Conveyancing Acts, 49, 8th ed.

(*d*) See above, pp. 609, 610.

(*e*) Davidson, Prec. Conv. vol. i. 591; vol. ii. pt. i. 663 n., 4th ed.

(*f*) Stat. 44 & 45 Vict. c. 41, s. 9 (2), (9).

(*g*) Above, p. 609.

(*h*) Above, p. 610.

(*i*) 2 Dart, V. & P. 783; Davidson, Prec. Conv. vol. ii. pt. i. 663 n., 4th ed.

Expenses of acknowledgment and undertaking.

By the Vendor and Purchaser Act, 1874 (*k*), such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself and all necessary parties other than the purchaser. This enactment is now applicable where statutory acknowledgments and undertakings are given instead of covenants.

Liability created by acknowledgment or undertaking.

A statutory acknowledgment only imposes the obligation defined in the Act of producing and delivering copies of the documents included therein; it does not confer any right to damages for loss or destruction of or injury to the documents, from whatever cause arising (*l*). But a statutory undertaking imposes the liability to pay damages for any breach thereof (*m*). It appears that a person entitled to the benefit of a statutory undertaking cannot obtain compensation for any depreciation of the market value of his land, which might be supposed to arise from the loss of or injury to the title deeds (*n*). But he may obtain compensation for the expense of additional documents of title, rendered necessary by such loss or injury (*o*).

Endorsement of receipt.

Since the Conveyancing Act of 1881 (*p*) took effect, it has no longer been the practice to endorse on purchase or other deeds a receipt for any purchase, mortgage or other consideration money therein expressed to have been paid and received: but the receipt clause usually inserted in the body of such deeds is treated as a sufficient acknowledgment of such payment (*q*).

(*k*) Stat. 37 & 38 Vict. c. 78, s. 2, rule 4.

(*l*) Stat. 44 & 45 Vict. c. 41, s. 9 (4)—(6).

(*m*) Sect. 9 (9), (10); see above, p. 611, and n. (*k*).

(*n*) *Brown* v. *Sewell*, 11 Hare, 49.

(*o*) *Hornby* v. *Matcham*, 16 Sim. 325.

(*p*) Stat. 44 & 45 Vict. c. 41, s. 55, making a receipt in the body of a deed *or* indorsed thereon sufficient evidence of payment in favour of a purchaser without notice of non-payment.

(*q*) For some time prior to that Act it was the practice to indorse

Settling the conveyance.

The draft of the conveyance is prepared, as we have seen (*r*), by the purchaser's solicitors. It is then sent to the vendor's solicitors for approval on his behalf; and if there be any other necessary parties to the conveyance besides the vendor (*s*), the draft is of course forwarded to their solicitors also to be settled on their behalf. Here it may be mentioned that when an instrument of assurance drawn by one conveyancer, whether counsel or solicitor, is sent to another to be settled on behalf of some party, whom the framer of the draft did not represent, the other should of course make all such alterations as he considers necessary to safeguard the interests of his client: but he should not alter the draft further or otherwise than is necessary to effect this end. In short, his alterations should be directed to matters of substance only and not of form; and it is a grave breach of conveyancing etiquette for one practitioner to amend another's draft in any point, on which his client's interests would not really be affected if the instrument were to stand as originally drawn (*t*). When the parties are agreed as to the form of the draft, the purchaser procures it to be engrossed at his own expense (*u*).

Stamps on conveyance.

The deed of conveyance must of course be duly stamped according to the *ad valorem* duty charged

such a receipt; and the absence of an indorsed receipt was considered sufficient to put a purchaser upon inquiry whether the money had in fact been paid, and to entitle him to further evidence of payment. It is thought that at the present time, where a title deed dated before 1882 has a receipt for consideration money in the body thereof but not indorsed thereon, and comes from the custody in which it would naturally be if the money had been duly paid, it may, in the absence of any other fact tending to prove the contrary, be presumed that the money was paid as stated in the body of the deed. See 3 Preston on Abstracts, 15; *White* v. *Wakefield*, 7 Sim. 401, 417; *Greenslade* v. *Dare*, 20 Beav. 284, 292; *Kettlewell* v. *Watson*, 21 Ch. D. 685, 703; Wms. Real Prop. 193, 194 and n. (*x*), 13th ed.; 596, 608, 19th ed.; Wms. Conv. Stat. 228—230; above, pp. 94, 97, 106, 115, 311.

(*r*) Above, p. 509.

(*s*) Above, p. 542.

(*t*) See 1 Dart, V. & P. 637.

(*u*) Ibid. 638.

on conveyances on sale by the Stamp Act, 1891 (*x*). This is the concern of the purchaser; the vendor is under no duty to see that it be done; and the deed may well be stamped after its execution (*y*). The vendor and his solicitor and conveyancing counsel are, however, concerned to see that all the facts and circumstances affecting the liability of the instrument of conveyance to duty, or the amount of the duty with which it is chargeable, are fully and truly set forth therein; for every person who, with intent to defraud the Crown, executes any instrument in which all such facts and circumstances are not so set forth, or being employed or concerned in or about the preparation of any instrument neglects or omits so to set forth therein all such facts and circumstances, incurs a fine of ten pounds (*z*). Under the Stamp Act, 1891, the duty on conveyances on sale is charged at the rate of one-half per cent. of the amount or value of the consideration (*a*); and the conveyances so chargeable include not only conveyances on *sale* in the strict sense of the word (*b*), but also all absolute conveyances of any property (*c*) in consideration of the transfer of stock, shares, securities or other chattels personal (*d*), or of a covenant to pay

(*x*) See stats. 54 & 55 Vict. c. 39, ss. 14, 54—61, and First Schedule; 58 Vict. c. 16, Pt. II.; Wms. Real Prop. 596, and n. (*p*), 19th ed.

(*y*) Conveyances on sale may be stamped, without penalty, within thirty days after their first execution; or if first executed out of the United Kingdom, within thirty days after they have been first received in the United Kingdom; or if the Commissioners have been required to adjudicate upon the stamp, within fourteen days after notice of the adjudication; see stat. 54 & 55 Vict c. 39, ss. 12, 13, 15, amended by 58 Vict. c. 16, s. 15.

(*z*) Stat. 54 & 55 Vict. c. 39, s. 5.

(*a*) 6*d*. for every 5*l*. or fraction thereof up to 25*l*.; 2*s*. 6*d*. for every 25*l*. or fraction thereof up to 300*l*.; and above 300*l*. 5*s*. for every 50*l*. or fraction thereof; stat. 54 & 55 Vict. c. 39, First Schedule.

(*b*) Above, pp. 1, 277.

(*c*) See *Great Northern Rail. Co.* v. *Inland Revenue Commrs.*, 1901, 1 K. B. 416, 417.

(*d*) *G. W. Rail. Co.* v. *Inland Revenue Commrs.*, 1894, 1 Q. B. 507; *Foster* v. *Inland Revenue Commrs.*, ibid. 516; *J. & P. Coats* v. *Inland Revenue Commrs.*, 1897, 2 Q. B. 423; *Chesterfield Brewery Co.* v. *Inland Revenue Commrs.*, 1899, 2 Q. B. 7. As to the stamp

and indemnify against some mortgage or charge on the property (*e*) or to pay a debt or other sum not charged on the property, or of the release of a debt (*f*), or of the grant of a rent-charge or an annuity. The Act contains (besides sect. 59 set out above (*g*)) the following special provisions as to conveyances on sale:—

Meaning of conveyance on sale.

(Sect. 54.) For the purposes of this Act the expression "conveyance on sale" includes every instrument, and every decree or order of any Court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale (*h*) thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction.

How *ad valorem* duty to be calculated in respect of stock and securities.

(Sect. 55 (1).) Where the consideration, or any part of the consideration, for a conveyance on sale consists of any stock or marketable security, the conveyance is to be charged with *ad valorem* duty in respect of the value of the stock or security.

(2.) Where the consideration, or any part of the consideration, for a conveyance on sale consists of any security not being a marketable security, the conveyance is to be charged with *ad valorem* duty in respect of the amount due on the day of the date thereof for principal and interest upon the security.

How consideration consisting of periodical payments to be charged.

(Sect. 56 (1).) Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period not exceeding twenty years, so that the total amount to be paid can be previously ascertained, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on such total amount.

(2.) Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period exceeding twenty years, or in perpetuity, or for any indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of the instrument.

(3.) Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically during any life or lives, the conveyance is to be charged in respect of that

---

duty upon an exchange of lands, see stat. 54 & 55 Vict. c. 39, s. 73, and First Schedule.

(*e*) *Bristol* v. *Inland Revenue Commrs.*, 1901, 2 K. B. 336.

(*f*) *Huntington* v. *Inland Revenue Commrs.*, 1896, 1 Q. B. 422; *Bristol* v. *Inland Revenue Commrs.*, ubi sup.

(*g*) P. 24, n. (*u*).

(*h*) See notes (*c*), (*d*), above.

consideration with *ad valorem* duty on the amount which will or may, according to the terms of sale, be payable during the period of twelve years next after the day of the date of the instrument.

(4.) Provided that no conveyance on sale chargeable with *ad valorem* duty in respect of any periodical payments, and containing also provision for securing the payments, is to be charged with any duty in respect of such provision, and no separate instrument made in that case for securing the payments is to be charged with any higher duty than ten shillings.

How conveyance in consideration of a debt, &c. to be charged.

(Sect. 57.) Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty (*i*).

Duty on conveyance in separate parcels of property sold for one consideration.

(Sect. 58 (1).) Where property contracted to be sold for one consideration for the whole is conveyed to the purchaser in separate parts or parcels by different instruments (*k*), the consideration is to be apportioned in such manner as the parties think fit, so that a distinct consideration for each separate part or parcel is set forth in the conveyance relating thereto, and such conveyance is to be charged with *ad valorem* duty in respect of such distinct consideration.

On conveyance in separate parcels of property bought for one consideration by or for several persons.

(2.) Where property contracted to be purchased for one consideration for the whole by two or more persons jointly, or by any person for himself and others, or wholly for others, is conveyed in parts or parcels by separate instruments to the persons by or for whom the same was purchased for distinct parts of the consideration, the conveyance of each separate part or parcel is to be charged with *ad valorem* duty in respect of the distinct part of the consideration therein specified.

Where there are several instruments of conveyance for completing one sale.

(3.) Where there are several instruments of conveyance for completing the purchaser's title to property sold (*l*), the principal instrument of conveyance only is charged with *ad valorem* duty, and the other instruments are to be respectively charged with such other duty as they may be liable to, but the last-mentioned duty shall not exceed the *ad valorem* duty payable in respect of the principal instrument.

Sub-sale by purchaser before conveyance.

(4.) Where a person having contracted for the purchase of any property, but not having obtained a conveyance thereof, contracts to sell the same to any other person, and the property is in consequence conveyed immediately to the sub-purchaser (*m*), the conveyance is to be charged with *ad valorem* duty in respect of the consideration moving from the sub-purchaser.

(*i*) See *Bristol* v. *Inland Revenue Commissioners*, 1901, 2 K. B. 336.

(*k*) See above, p. 546.

(*l*) See above, pp. 546—548.

(*m*) See above, p. 545.

(5.) Where a person having contracted for the purchase of any property but not having obtained a conveyance contracts to sell the whole, or any part or parts thereof, to any other person or persons, and the property is in consequence conveyed by the original seller to different persons in parts or parcels, the conveyance of each part or parcel is to be charged with *ad valorem* duty in respect only of the consideration moving from the sub-purchaser thereof, without regard to the amount or value of the original consideration.

Conveyance in separate parcels after a sub-sale.

(6.) Where a sub-purchaser takes an actual conveyance of the interest of the person immediately selling to him, which is chargeable with *ad valorem* duty in respect of the consideration moving from him (*n*), and is duly stamped accordingly, any conveyance to be afterwards made to him of the same property by the original seller shall be chargeable only with such other duty as it may be liable to, but the last-mentioned duty shall not exceed the *ad valorem* duty.

Where sub-purchaser has taken a conveyance of the purchaser's interest.

(Sect. 60.) Where upon the sale of any annuity or other right not before in existence (*o*) such annuity or other right is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument, or some one of such instruments, if there be more than one, is to be charged with the same duty as an actual grant or conveyance, and is for the purposes of this Act to be deemed an instrument of conveyance on sale.

As to sale of annuity or right not before in existence.

(Sect. 61 (1).) In the cases hereinafter specified the principal instrument is to be ascertained in the following manner:—

Conveyance by several instruments.

(a) Where any copyhold or customary estate is conveyed by a deed (*p*), no surrender being necessary, the deed is to be deemed the principal instrument:

Copyholds conveyed by deed.

(b) In other cases of copyhold or customary estates (*p*), the surrender or grant, if made out of Court, or the memorandum thereof, and the copy of court roll of the surrender or grant, if made in Court, is to be deemed the principal instrument (*q*):

By surrender.

(c) Where in Scotland there is a disposition or assignation executed by the seller, and any other instrument is executed for completing the title, the disposition or assignation is to be deemed the principal instrument.

(2.) In any other case the parties may determine for themselves which of several instruments is to be deemed the principal instrument, and may pay the *ad valorem* duty thereon accordingly.

Sale of an equitable

As we have seen (*r*), on the sale of any equitable

(*n*) See above, p. 24, n. (*u*).
(*o*) See above, p. 383.
(*p*) Above, pp. 196, 348 *sq.*
(*q*) See also sects. 65—68. No stamp duty is chargeable on an admittance: Elton on Copyholds, 282, 339, n. (*b*).
(*r*) Above, p. 24, n. (*u*).

interest in lands.

interest in lands the contract for sale may be stamped with the *ad valorem* duty, and in that case the conveyance is not chargeable with any further stamp duty.

Of equity of redemption.

On the sale of an equity of redemption, as the purchaser takes upon himself the burden of the mortgage debt (*s*), the conveyance is chargeable with *ad valorem* duty, not only on the price, but also on the amount of the mortgage debt (*t*). So a conveyance of the equity of redemption by a mortgagor to a mortgagee, in consideration of the release of the mortgage debt, is chargeable as a conveyance on sale with stamp duty on the amount of the debt (*u*). And a conveyance executed by a mortgagor in pursuance of an order for foreclosure absolute, obtained by an *equitable* mortgagee and directing the mortgagor to execute a conveyance of the legal estate, has been held chargeable with stamp duty as a conveyance on sale (*x*). It was considered that such duty was not chargeable on an order for foreclosure absolute obtained by a legal mortgagee (*y*). But by the Finance Act, 1898 (*z*), all decrees or orders for or having the effect of an order for foreclosure were made chargeable with *ad valorem* stamp duty as upon a conveyance on sale; and where this duty has been paid, any conveyance following upon such decree or order shall be exempt from the *ad valorem* duty. As we have seen (*a*), not only a conveyance by deed, but any instrument or order of any Court may be chargeable with stamp duty as a conveyance on sale. Vesting orders (*b*) may therefore be so chargeable; and so may Acts of Parliament (*c*). The stamp duty on conveyances

(*s*) Above, p. 595.

(*t*) See sect. 57, above, p. 620.

(*u*) See *Bristol* v. *Inland Revenue Commrs.*, 1901, 2 K. B. 336, and next note.

(*x*) *Huntington* v. *Inland Revenue Commrs.*, 1896, 1 Q. B. 422.

(*y*) See *S. C.*, 1896, 1 Q. B. 429; *Inland Revenue Commrs.* v. *Tod*, 1898, A. C. 399, 418.

(*z*) Stat. 61 & 62 Vict. c. 10, s. 6.

(*a*) Sect. 54, above, p. 619. By sect. 122, "instrument" includes every written document.

(*b*) See above, pp. 469, 493.

(*c*) See *G. W. Rail. Co.* v. *Inland Revenue Commrs.*, 1894, 1

on sale is chargeable on the value of all property assured by the conveyance; so that where on a sale of land the timber or fixtures is or are sold by valuation (*d*), the amount of the valuation must be stated in the conveyance (*e*). So must the value of the goodwill of a business, where separately valued and assigned by the conveyance of any land or chattels forming part of the assets of the business, and also where it is separately assigned (*f*). A conveyance of land in consideration of a rent-charge to issue thereout (*g*) is chargeable as prescribed above in the case of periodical payments (*h*); and if a lump sum be further payable immediately as part of the consideration, *ad valorem* duty is chargeable on that also. But on a sale of land subject to an existing rent-charge or any kind of rent, as rent service on the sale of leaseholds, the payment of the rent is held not to form any part of the consideration for the purposes of stamp duty, notwithstanding that the purchaser covenant to indemnify the vendor against such payment (*i*); and this is so where part of land subject to one entire rent is sold and the rent is apportioned as between the parties to the sale (*k*). By the Finance Act, 1900 (*l*), a conveyance of sale made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and in further consideration of a covenant by the purchaser to make, or of his having

Conveyance in consideration of a rent-charge.

Q. B. 507. Under the Finance Act, 1895 (stat. 58 Vict. c. 16), s. 12, where after the passing thereof by virtue of any Act of Parliament, whenever passed, any property is vested by way of sale in any person or any person is authorised to purchase property, then in the former case a King's printer's copy of the Act or some instrument relating to the vesting, and in the latter an instrument of conveyance, is to be stamped with the *ad valorem* duty payable upon a conveyance on sale of the property and produced to the Inland Revenue Commissioners.

(*d*) Above, p. 50.

(*e*) 2 Dart, V. & P. 788.

(*f*) See *Potter* v. *Inland Revenue Commrs.*, 10 Ex. 147; cases cited above, p. 25.

(*g*) Above, pp. 595 *sq.*

(*h*) Above, p. 619.

(*i*) Above, pp. 590, 595.

(*k*) *Swayne* v. *Inland Revenue Commrs.*, 1900, 1 Q. B. 172.

(*l*) Stat. 63 Vict. c. 7, s. 10.

previously made, any substantial improvement of or addition to the property conveyed to him, or of any covenant relating to the subject-matter of the conveyance, is not chargeable, and shall be deemed not to have been chargeable, with any duty in respect of such further consideration. So where land is conveyed in consideration of a rent-charge, and of a covenant to build thereon (*m*), or of the previous erection of buildings thereon, no stamp duty is chargeable in respect of the covenant or improvement.

Where several transactions are carried out by one instrument.

By the Stamp Act, 1891 (*n*), except where express provision to the contrary is made by this or any other Act, an instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters; and an instrument made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and also for any further or other valuable consideration or considerations, is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the considerations. So that where a conveyance takes effect as upon sale and also as a mortgage (*o*), it is chargeable with stamp duty on each of these transactions (*p*). Where one holding land subject to any kind of incumbrance (*q*) sells the same free from incumbrances and on completion of the sale the land is conveyed to the purchaser by one deed, in which the vendor and the incumbrancers concur to assure their respective interests (*r*), stamp duty is only chargeable as upon a conveyance on sale, notwithstanding that the incumbrancers were no parties to the contract of sale

(*m*) Above, p. 596.
(*n*) Stat. 54 & 55 Vict. c. 39, s. 4.
(*o*) See above, pp. 552—555.
(*p*) 2 Dart, V. & P. 796.
(*q*) See above, p. 547.
(*r*) See above, p. 548.

and receive no part of the consideration; for, although as between the incumbrancers and the vendor their conveyance be voluntary, yet as between the conveying parties and the purchaser, the assurance is for one valuable consideration (*s*) and is nothing more than the conveyance on sale to him of the whole estate contracted for (*t*). But if in a deed of conveyance on sale some interest is also assured, which is outside the transaction of sale, as if an estate in remainder or reversion or subject to some incumbrance were sold, and after the sale but before completion the purchaser were to induce the owner of the particular estate or incumbrance either gratuitously or for value to concur in the conveyance, then the deed would be chargeable with stamp duty, not only as a conveyance on sale, but also in respect of the assurance of the estate or interest not included in the sale (*u*). Where incumbrances are got in by a vendor prior to conveyance to the purchaser (*x*), the deeds of reconveyance, release or other assurance are chargeable with the stamp duty payable on such transactions under the Stamp Act, 1891 (*y*), and the duty must of course be borne by the vendor (*x*). Where any instrument is duly stamped, as for its leading and principal object, this stamp covers everything accessory to that object (*z*). The inclusion in a deed of conveyance of an acknowledgment or undertaking for production or safe custody of any of the title deeds does not therefore involve the payment of any additional stamp duty (*a*). The purchaser must bear the expense of stamping the conveyance (*b*).

Expense of stamping.

(*s*) Above, p. 560.

(*t*) See Sug. V. & P. 570; 2 Dart, V. & P. 795.

(*u*) See Alpe's Stamp Duties, 124, 8th ed.

(*x*) See above, p. 547.

(*y*) Above, p. 620.

(*z*) *Limmer, &c. Co.* v. *Inland Revenue Commrs.*, L. R. 7 Ex. 211, 217.

(*a*) See Sug. V. & P. 571; 2 Dart, V. & P. 797.

(*b*) Above, pp. 28, 618.

§ 4.—*Of the Adjustment of Accounts.*

If the purchase should be completed at the proper time for completion, the purchase money will be payable without interest (*c*), and the only matter in respect of which any adjustment of accounts may be necessary is the apportionment of the rents or profits and the outgoings (*d*). In practice, however, it is exceptional for a sale of land to be completed at the proper time; so that an account has usually to be taken of what is chargeable against the vendor on account of rents and profits received by him since the proper time for completion and what is due to him for interest on the purchase money (*e*). Besides this, the amount of the purchase money may in some cases be diminished or increased by a valid claim for compensation on the part of either purchaser or vendor. We will consider each of these matters in turn.

Apportionment of rent on completion.

First, as to the apportionment of rent. Where the lands sold or any part of them are let, and the time for completion of the sale does not fall on some rent-day, we have seen that the vendor is either by law or express stipulation entitled to an apportioned part of the rent accrued due since the last rent-day (*f*). He cannot, however (except by express stipulation), require the purchaser to pay this apportioned part of the rent to him on completion: but he must wait until the entire rent for the current quarter, half-year, or other period, for which the rent was reserved, has become due and payable; when (if the purchase has been completed) the purchaser will be entitled to recover the entire rent from the tenant (*g*) and the vendor to exact payment of his apportioned part from the purchaser (*h*). For this

(*c*) Above, pp. 22, 37, 41, 47—50.
(*d*) Above, pp. 41, 56, 451, 457.
(*e*) Above, p. 449.
(*f*) Above, pp. 41, 56.
(*g*) Above, p. 379.
(*h*) This is so provided by the Apportionment Act, 1870 (stat.

reason it is not uncommonly provided in conditions of sale by auction that the purchaser shall on completion pay to the vendor the proportion due to him of the current rents and shall retain the whole amount of such rents for his own benefit (*i*). As to the outgoings, where these are apportionable between the parties (*k*) and payable in advance, as rates and taxes are, the vendor having paid any such outgoings before the time for completion is entitled to be recouped by the purchaser to the extent of the proportion attributable to the latter. And of apportionable outgoings, which are not payable in advance (such as ground rent or tithe rent-charge), and will become payable after the proper time for completion, it is thought that the purchaser is entitled to claim that the proportion, which ought to be borne by the vendor, shall be allowed in account and deducted from the purchase money on completion. This certainly appears to be so, where the vendor has expressly agreed to discharge or to clear the outgoings (*l*). And it is thought that upon a sale by open contract the vendor incurs the like liability to discharge the outgoings (*m*), and must equally clear off on completion his proportion of any outgoings which are apportionable by law and not payable until after the time for completion. As we have seen (*n*), where any outgoings, which are not apportionable, become charged upon the property sold before the time for completion, the vendor is bound, in the absence of stipulation to the contrary, to discharge them before completion, although they may not become

Apportionment of outgoings.

33 & 34 Vict. c. 35), ss. 3, 4, in the absence of express stipulation. And it is thought that the same law applies where the contract of sale contains an express stipulation for apportionment of the rents: see 1 Davidson, Prec. Conv. 666, 4th ed., where the special condition would have been unnecessary if this were not the law; and cf. *Barsht* v. *Tagg*, 1900, 1 Ch. 231, 235.

(*i*) 1 Key & Elph. Prec. Conv. 243, 244, 7th ed.

(*k*) Above, p. 457.

(*l*) See *Lawes* v. *Gibson*, L. R. 1 Eq. 135; above, pp. 56, 62, 457.

(*m*) Above, p. 41.

(*n*) Above, pp. 41, 454 *sq.*

payable until after completion. In such cases, if the amount of the vendor's liability be exactly ascertained before the date of actual completion, he must either discharge the outgoing himself or allow the amount to be set off against an equal part of the purchase money (*o*). If the liability be not exactly ascertained before the time for completion, as where a charge has been created under the Private Street Works Act, 1892, but no final apportionment of expenses made, then, as the vendor cannot make a good title to the property sold as being free from incumbrances while the charge continues to subsist (*p*), the purchaser may, it is thought, refuse to complete without some substantial guarantee that the vendor will duly perform his obligation in this behalf; as that part of the purchase money sufficient to satisfy the incumbrance shall be deposited in their joint names until the charge shall have been paid off.

Apportionment of land tax and tithe rent-charge.

Here it may be mentioned that when a part of lands rated or charged together for the purposes of land tax or tithe rent-charge is sold, the tax or rent-charge may be apportioned (*q*): but as land tax and tithe rent-charge are not incumbrances (*r*), it does not appear that it is the vendor's duty to procure this to be done; the purchaser must see to it himself after completion (*s*). So also the purchaser must see for himself after com-

(*o*) *Re Betteswortb and Richer*, 37 Ch. D. 535.

(*p*) See *Stock* v. *Meakin*, 1900, 1 Ch. 683; above, p. 455.

(*q*) See stats. 42 Geo. III. c. 116, s. 35, as to land tax; 5 & 6 Vict. c. 54, s. 14; 23 & 24 Vict. c. 93, s. 11, as to tithe rent-charge.

(*r*) Above, p. 141.

(*s*) See *Re Ebsworth and Tidy*, 42 Ch. D. 23. If this were not so, special stipulations would be required on every sale of freeholds in lots: but it is not considered that these are necessary, except where the vendor represents in the particulars or agreement for sale that the lots sold are each subject to particular sums payable in respect thereof for land tax and tithe rent-charge. In this case, he would, in the absence of stipulation to the contrary, be bound to procure a legal apportionment, if the whole of the lots were rated or charged together for these purposes. See 1 Davidson, Prec. Conv. 616, 622, 689, 4th ed.; 1 Key & Elph. Prec. Conv. 294, 7th ed.

pletion that the property sold is separately rated for the purposes of imperial or local taxation. But when the land sold is subject to some incumbrance charged thereon and on other lands as well, such as a rent reserved out of the entirety of leaseholds sold in lots or a rent-charge issuing out of the land sold and other land, the charge is of course, in the absence of stipulation to the contrary, an objection to the title (*t*); and if the vendor should have sold the land as being subject only to a part, proportionate to its value, of the rent or other charge, he must procure the same to be legally apportioned (*u*), or he cannot enforce the contract. In such cases, therefore, as a legal apportionment cannot generally be made by consent of the vendor and purchaser alone, it is usual for the vendor to make special stipulations exonerating him from the obligation of procuring a legal apportionment and providing for the incidence of the charge as between the parties to the sale (*x*). Where the reversion of part of lands let on lease at one entire rent is sold, the vendor should stipulate that the purchaser will be entitled to a certain yearly rent (stating the amount) as an apportioned part of the entire rent, and that the consent of the tenant to this apportionment (*y*) shall not be required (*z*). If the vendor should represent that the land sold were let at the rent stated, without mentioning that this was only an estimated part of a larger rent intended to be apportioned, he would be bound to procure a legal apportionment of the rent; and further, if in such case the land were sold with the benefit of a condition of re-entry on breach of covenant, and this condition would

Sale of land subject to a rent attaching thereon and on other land.

Sale of reversion of part of land let at one rent.

(*t*) Above, pp. 133, 141, 142, 360—362.

(*u*) Above, pp. 362, 380, n. (*o*).

(*x*) See 1 Dart, V. & P. 147; 1 Davidson, Prec. Conv. 544, 684 *sq.*, 699 *sq.*, 4th ed.; 1 Key & Elph. Prec. Conv. 274 and n. (*d*), 322 *sq.*, 7th ed.; above, p. 362.

(*y*) See above, p. 380, n. (*o*).

(*z*) 1 Dart, V. & P. 147; 1 Davidson, Prec. Conv. 546, 547, 4th ed.

be destroyed by severance of the reversion (*a*), he would not be enabled to enforce the contract for sale (*b*).

Purchaser's liability to pay interest.

The rules respecting the purchaser's liability to pay interest on the unpaid purchase money have been already stated. As we have seen (*c*), this obligation arises either by implication of law or express stipulation at the time when the purchaser acquires the right to enter into possession or receipt of the rents and profits of the property sold; the principle being that enjoyment of the fruits of the contract by the purchaser ought only to be had on condition of payment of the price, and that if payment be deferred, interest should be chargeable (*d*). In this respect the provisions implied by law in an open contract are far more equitable than those of the usual express stipulation made on London sales by auction, which is grossly unfair to purchasers and frequently works great hardship (*e*). Thus, under an open contract, where the vendor is in possession, the purchaser is only liable to pay interest, if there be delay in completion, from the time when he may safely take possession, that is, when a good title has been shown (*f*); and this is the case, although a day be fixed for completion, and owing to delay attributable to the state of the title, or otherwise to the vendor, a good title is not shown until after that day (*g*). And if the purchaser be in possession at the time of the contract for sale, or actually enter into possession afterwards, but before completion, or if the property sold be of such a nature that the enjoyment thereof necessarily runs from the

Under an open contract.

(*a*) Above, p. 381.
(*b*) See *Walter* v. *Maunde*, 1 J. & W. 181.
(*c*) Above, pp. 41, 49, 56, 449.
(*d*) Above, p. 42, n. (*o*).
(*e*) See above, pp. 56, 57, 63, and n. (*d*), 73.
(*f*) Above, pp. 22, 37, 41.
(*g*) *Jones* v. *Mudd*, 4 Russ. 118; above, p. 50; *Re Highett and Bird's Contract*, 1902, 2 Ch. 214, 217 (which appears to be quite right in this respect: see above, p. 354).

time of sale, as in the case of a remainder expectant on a life estate returning no rent (*h*), then interest is payable from the time when actual possession or enjoyment by the purchaser as such so commenced, that is, from the date of the contract for sale or actual entry into possession (*i*). Then under an open contract, if there be delay in completion which is attributable to the vendor, the purchaser may, by appropriating his money to the purchase and giving to the vendor notice of such appropriation, relieve himself of the liability to pay any greater interest thereon than such, if any, as is allowed upon such appropriation. Though he cannot escape his regular liability to pay interest by making such appropriation, if there be delay in completion which is attributable to himself (*k*). But under the usual stipulation for payment of interest in case the contract shall not be completed on the appointed day from any cause whatever, or from any cause whatever other than the wilful default of the vendor (*l*), the purchaser must pay interest at the rate agreed upon (though far exceeding the return derived from the rents and profits), if there be delay in completion arising from the state of the title, a cause which would otherwise be attributable to the vendor (*m*). And the purchaser cannot, according to the better opinion, divest himself of this liability by appropriating his money to the purchase (*n*). The ground on which the law has been so established is that the purchaser having chosen to enter into such a stringent agreement must abide by its terms, and that owing to the difficulties attendant on making out a title to land, delays so caused cannot be ascribed to the vendor's

Under the stipulation usual on London sales.

(*h*) Above, pp. 382, 383, 507.

(*i*) *Expte. Manning*, 2 P. W. 410; *Fludyer* v. *Cocker*, 12 Ves. 25; *A.-G.* v. *Christchurch*, 13 Sim. 214; 2 Dart, V. & P. 711.

(*k*) Above, p. 42.

(*l*) Above, pp. 56, 57.

(*m*) *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517; *Williams* v. *Glenton*, L. R. 1 Ch. 200; *Re Mayor of London and Tubbs*, 1894, 2 Ch. 524; *Bennett* v. *Stone*, 1903, 1 Ch. 509, 516, 520, 525.

(*n*) Above, p. 57.

wilful default. Where the contract is to pay interest, if from any cause whatever the contract be not completed on the appointed day, it is considered that the purchaser cannot escape the express obligation so undertaken unless the delay be caused by the vendor's vexatious conduct, dealing in bad faith, or gross negligence (*o*). Where the purchaser has agreed to pay interest if completion be delayed from any cause whatever other than the vendor's wilful default, he must show that the vendor has committed some wilful default within the meaning of the clause, and must further prove that such default was the effective cause of the delay (*p*). As we have seen (*q*), the late Lord Bowen remarked upon the futility of attempting to formulate an exact definition of wilful default which would cover all cases, whilst at the same time he ascribed to each of these words a particular meaning. And his explanation of this term has been religiously adopted in subsequent cases, but has hardly proved a satisfactory guide. The particular acts or omissions which have been held to fall within or without the expression "wilful default" have been already stated (*r*); and as we have seen, in the last of these cases four judges were divided equally in opinion upon the question, whether it is wilful default for a vendor to insist mistakenly, but in apparent honesty, upon an unreasonable contention with respect to the form of the conveyance (*s*). The further point above alluded to,

Contract to pay interest except on vendor's wilful default.

(*o*) Above, p. 57.

(*p*) See *Re Mayor of London and Tubbs' Contract*, 1894, 2 Ch. 524; *Bennett* v. *Stone*, 1903, 1 Ch. 509.

(*q*) Above, p. 57, and n. (*i*).

(*r*) Above, p. 57, n. (*i*).

(*s*) *Bennett* v. *Stone*, 1902, 1 Ch. 226, 1903, 1 Ch. 509. The purchaser was by the contract entitled to the benefit of certain covenants entered into with the vendors by a third party. The purchaser required that the benefit of these covenants should be expressly conveyed to him. The vendors would only agree to this with the addition of the words "so far as they are now at law or in equity entitled to assign the benefit of these covenants without thereby warranting that such covenants are now

that the purchaser must prove that the vendor's wilful default (where it exists) is the effective cause of the delay, is illustrated by the cases of *Re Mayor of London and Tubbs' Contract* and *Bennett* v. *Stone* already cited (*t*). In the first of these, it was considered by the whole Court that, even if there were wilful default by the vendor—as to which they differed in opinion—the purchaser could not escape liability to pay interest, if the delay were in truth caused by his own conduct in making voluntary requisitions and his inability to find the purchase money. And in the latter case, three judges out of four held that, if the vendor were in wilful default, yet the purchaser was not on that account released from his obligation to pay interest, where the real cause of the delay was his own inability to provide the purchase money. Where a purchaser had agreed to pay interest if from any cause whatever other than "the default" of the vendor the sale were not completed on the day fixed, and completion was delayed on account of an objection to the title, which was not obviously apparent on the face of the title deeds and was not known to the vendor at the time of sale, Lord Bowen's explanation of the meaning of *default* (*u*) was adopted, and it was held that the purchaser was not excused from paying interest, for the vendor had not failed to do something which he ought reasonably to have done (*x*). Where the contract is that if completion be delayed from any cause whatever "the purchaser in default" shall pay interest, he is not obliged to pay interest if there be delay arising from the state of the title or otherwise attributable to the vendor (*y*).

To pay except on vendor's default.

Purchaser in default to pay interest.

enforceable by their assigns." See above, pp. 569, 576.

(*t*) Above, pp. 57, n. (*i*), 632.

(*u*) Above, p. 57, n. (*i*).

(*x*) *Re Woods and Lewis's Contract*, 1898, 1 Ch. 433, 2 Ch. 211.

(*y*) *Denning* v. *Henderson*, 1 De G. & Sm. 689; *Jones* v. *Gardiner*, 1902, 1 Ch. 191.

Items chargeable against or for vendor.

The various items which may be charged in account against or in favour of a vendor remaining in possession after the time when interest on the purchase money has become payable, have been stated in the preceding chapter (*z*); where we have also explained what claims may be made against the vendor for deterioration of the property sold (*a*).

Deterioration of the property.

Compensation for errors of description.

The only case in which the adjustment of a claim for compensation is an act done in pursuance of the contract for sale is where an express agreement to make or allow compensation for errors of description forms part of that contract (*b*). In all other cases a party claiming compensation is really seeking, not to carry out the contract as it stands, but to enforce its performance with a variation. It will be convenient, however, to treat in this place of these cases as well; since any claim for compensation will usually be allowed and adjusted before completion and without litigation, if the claimant can establish a clear right to enforce specific performance of the contract with compensation. And in all cases of innocent misdescription it is essential that the claim for compensation should be made before completion, if the contract contain no express agreement to make compensation; for, except in the case of such an express agreement, the claim cannot afterwards be enforced (*c*).

Claims to compensation under an open contract.

The position of the parties to an open contract with respect to claims for compensation has been already indicated (*d*). Any misdescription of the property sold must result in a breach of the contract at law; for in such case the vendor cannot discharge his obligation of producing a property corresponding with that which he has purported to sell (*d*); and he is bound at law to

(*z*) Above, pp. 449, 451—457.

(*a*) Above, pp. 446—449.

(*b*) Above, p. 55.

(*c*) Above, pp. 55, 540.

(*d*) Above, p. 36.

produce a property answering exactly to that described in the contract, no difference between substantial and insubstantial errors being admitted (*e*). But in equity it is held that, where there is an insubstantial error innocently made in the description of the property sold, the vendor may nevertheless enforce the specific performance of the contract, giving compensation for the deficiency; and this is the case whether the deficiency be of acreage or quantity, or be of right, as in the case of a quit rent not mentioned in the particulars, or where a very small part of a property described as freehold is copyhold or leasehold (*f*). This relief, however, will only be afforded in the case of an error made in entire innocence and good faith. It will be refused if the misdescription amount to a wrongful misrepresentation (*g*). And if the mistake occurred in any point really material to the enjoyment promised by the description in the contract, the vendor cannot oblige the purchaser to perform the contract, whether the misdescription were innocently made or not, and whether it related to the quantity or situation of the land sold, or to the vendor's tenure, estate or right (*h*). As we have seen (*i*), compensation is not payable for patent defects—those which are discoverable by an inspection of the property sold—but may well be claimed for defects which are latent; and will not be allowed for

(*e*) See *Mortlock* v. *Buller*, 10 Ves. 292, 305; *Halsey* v. *Grant*, 13 Ves. 73, 77; *Clermont* v. *Tasburgh*, 1 J. & W. 112, 120; 2 Dart, V. & P. 1083, 1084.

(*f*) *Calcraft* v. *Roebuck*, 1 Ves. jun. 221; *Halsey* v. *Grant*, 13 Ves. 73; *Esdaile* v. *Stephenson*, 1 S. & S. 122; *Scott* v. *Hanson*, 1 R. & M. 128; *King* v. *Wilson*, 6 Beav. 124; *Powell* v. *Elliot*, L. R. 10 Ch. 424; above, p. 141.

(*g*) *Clermont* v. *Tasburgh*, 1 J. & W. 112, 120; *Price* v. *Macaulay*, 2 De G. M. & G. 339; *Dimmock* v. *Hallett*, L. R. 2 Ch. 21, 28, 31; *Re Terry and White's Contract*, 32 Ch. D. 14, 29.

(*h*) See *Drewe* v. *Hanson*, 6 Ves. 675, 679; *Halsey* v. *Grant*, 13 Ves. 73, 78, 79; *Binks* v. *Rokeby*, 2 Swanst. 222, 225; *Peers* v. *Lambert*, 7 Beav. 546; Fry, Sp. Perf. 548—557, 3rd ed.; *Re Arnold*, 14 Ch. D. 270; *Jacobs* v. *Revell*, 1900, 2 Ch. 858; *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258. (In the last three cases there was a condition excluding compensation.)

(*i*) Above, pp. 540, 541; *Dyer* v. *Hargrave*, 10 Ves. 505.

defects, of which the purchaser had notice when he bought. It is thought that the doctrine enabling the vendor to enforce specific performance with compensation is only applicable where there is a *deficiency* in the property offered in fulfilment of the contract as compared with that described therein; and does not permit a vendor to enforce specific performance with compensation in his own favour. Thus, if a man sell for a particular price "my house and lands called Broadlands, containing 100 acres," and Broadlands contain a little less than that quantity, he may enforce specific performance with compensation: but if Broadlands contain rather more than 100 acres, it is thought that the vendor cannot oblige the purchaser to perform the contract specifically on payment of a proportionately increased price (*k*). But where a vendor makes inadvertently and in good faith a serious error to his own disadvantage in the description of the property sold or the price to be paid for it, the Court will not compel him to perform the contract specifically at suit of the purchaser; but will leave the latter to his remedy at law, unless he elect to take without compensation what the vendor really intended to sell or to pay the price the vendor meant to ask. The Court will not, however, rescind the contract at the vendor's instance in such a case (*l*).

The purchaser's right to specific performance with compensation.

So far we have dealt with the vendor's case. The purchaser under an open contract containing a misdescription of the property sold is in a different position. For the rule is that the vendor, having represented himself to be the owner of or to be entitled

(*k*) See *Manser* v. *Back*, 6 Hare, 443, 447, 448; 2 Dart, V. & P. 729.

(*l*) See *Neap* v. *Abbott*, C. P. Coop. (1837-8), 333; *Helsham* v. *Langley*, 1 Y. & C. C. C. 175; *Manser* v. *Back*, 6 Hare, 443, 447, 448; *Leslie* v. *Tompson*, 9 Hare, 268; *Alvanley* v. *Kinnaird*, 2 Mac. & G. 1, 7; *Scott* v. *Littledale*, 8 E. & B. 815; *Webster* v. *Cecil*, 30 Beav. 62; *North* v. *Percival*, 1898, 2 Ch. 128; 2 Dart, V. & P. 729.

to sell a particular property, is estopped from showing in avoidance of the contract that he has the right to convey a part only and not the whole of what he purported to sell (*m*). The purchaser therefore is, as a rule, entitled, if it turn out that there is a mere *deficiency*, whether of area, estate or right, and whether substantial or not, between the property described in the contract and that offered in fulfilment thereof, to enforce the specific performance of the contract, taking such interest in the property sold as the vendor has and receiving compensation for the deficiency. For example, where a vendor described the land sold as containing a much greater quantity than its actual area (*n*), where a vendor could make no title to a considerable part of the land sold (*o*), and where a vendor who purported to sell the fee simple of certain land was entitled as tenant for life (*p*), tenant in remainder subject to a life estate (*q*), tenant *pur autre vie* (*r*), or to an undivided moiety only (*s*), he was obliged at the purchaser's suit to convey what estate he had and to allow compensation for the deficiency. The exceptions to this rule appear to be the following:—The Court will not enforce specific performance with compensation at the purchaser's suit, where such an order would be prejudicial to the rights or interests of third parties (*t*); or where the only property which the vendor can convey is an entirely different kind of thing from that described

(*m*) *Mortlock* v. *Buller*, 10 Ves. 292, 315; *Castle* v. *Wilkinson*, L. R. 5 Ch. 534, 536; *Rudd* v. *Lascelles*, 1900, 1 Ch. 815, 818.

(*n*) *Hill* v. *Buckley*, 17 Ves. 394, in which case it was also held that, where the contents of any land sold are stated in the description thereof, it must be taken that the price was fixed with reference thereto.

(*o*) *Western* v. *Russell*, 3 V. & B. 187, 192.

(*p*) *Cleaton* v. *Gower*, Finch, 164.

(*q*) *Bolingbroke's case*, 1 Sch. & Lef. 19, n., cited 2 Ph. 605; *Nelthorpe* v. *Holgate*, 1 Coll. 203; *Barker* v. *Cox*, 4 Ch. D. 464.

(*r*) *Barnes* v. *Wood*, L. R. 8 Eq. 424.

(*s*) *Hooper* v. *Smart*, L. R. 18 Eq. 683; *Horrocks* v. *Rigby*, 9 Ch. D. 180.

(*t*) *Thomas* v. *Dering*, 1 Keen, 729, 6 L. J. (N. S.) Ch. 267; *Willmott* v. *Barber*, 15 Ch. D. 96.

in the contract and the difference is incapable of estimation at a money value, as where land sold as unincumbered freehold is subject to restrictive covenants (*u*); or where the vendor has innocently made a serious error of description to his own disadvantage and it would be a great hardship to enforce specific performance with compensation against him (*x*). And where there has been a mistake in the description of land put up for sale by auction, and the mistake has been corrected orally by the auctioneer immediately before the sale, the purchaser cannot enforce specific performance with compensation, notwithstanding that he did not hear the correction (*y*). Besides this, it appears that where the purchaser bought with notice of the vendor's defect of title, he cannot enforce specific performance with compensation for the defect: except where the contract contained an express agreement that the vendor should show a good title or otherwise remove the defect (*z*). It is thought that if the contract for sale contain no stipulation at all respecting compensation for errors of description, but include the usual clause empowering the vendor to rescind in case of the purchaser's insistence on an unwelcome requisition (*a*), the vendor is at liberty to rescind the contract under this clause rather than comply with a requisition for compensation on account of a serious error of description innocently made to his own disadvantage (*b*).

(*u*) *Rudd* v. *Lascelles*, 1900, 1 Ch. 815; Fry, Sp. Perf. § 1276, p. 571, 3rd ed., p. 544, 4th ed.; and cf. below, pp. 640, 641, 643.

(*x*) *Durham* v. *Legard*, 34 Beav. 611; *Rudd* v. *Lascelles*, ubi sup.

(*y*) *Manser* v. *Back*, 6 Hare, 443; *Re Hare and O'More's Contract*, 1901, 1 Ch. 93, where there was an express contract to make compensation. The purchaser is, however, in such case entitled to rescind the contract, if he be unwilling to complete without compensation: see the case last cited.

(*z*) Above, p. 164; *Castle* v. *Wilkinson*, L. R. 5 Ch. 534; Fry, Sp. Perf. § 1271, p. 569, 3rd ed., p. 542, 4th ed. Distinguish *Barker* v. *Cox*, 4 Ch. D. 464, on the ground that there the vendor expressly undertook to procure an assurance from all necessary parties.

(*a*) Above, pp. 54, 147—150.

(*b*) Fry, Sp. Perf. § 1269, p. 569, 3rd ed., p. 541, 4th ed.; and see

Condition excluding any right to compensation for errors of description.

Where lands are sold under a stipulation that errors of description shall not annul the sale, but no compensation shall be allowed therefor (*c*), the contract is not broken at law by any small discrepancy between the property sold and that offered in fulfilment of the contract (*d*); and the vendor may enforce specific performance of the contract without compensation, notwithstanding any such discrepancy. But it is held that, as regards the enforcement of the contract at the vendor's suit, whether in equity specifically or at law, such a stipulation only covers small errors of description, and does not oblige the purchaser to accept a property which is substantially different from that which the vendor purported to sell (*e*). The better opinion is, however, that the purchaser is precluded by such a stipulation from requiring specific performance of the contract with compensation (*f*), whether the error of description were small or great (*g*). If the contract contain this stipulation and also the usual clause enabling the vendor to rescind (*h*), and the purchaser claim compensation for a misdescription, made innocently but involving a considerable error to the vendor's disadvantage, the vendor will be entitled to exercise the right of rescission so reserved to him (*i*).

Condition allowing compensation; the vendor's rights.

Where it is a term of the contract that errors of description shall not annul the sale, but compensation shall be made or allowed therefor (*k*), the contract is enforceable by the vendor with compensation either at law or specifically in equity, even though there be a considerable discrepancy in quantity or estate between

cases cited below, pp. 639, n. (*i*), 644, nn. (*m*), (*o*).

(*c*) Above, pp. 55, 61.

(*d*) *Nicoll* v. *Chambers*, 11 C. B. 996.

(*e*) *Jacobs* v. *Revell*, 1900, 2 Ch. 858; *Re Puckett and Smith's Contract*, 1902, 2 Ch. 258.

(*f*) Above, p. 637.

(*g*) See cases cited above, p. 55, n. (*u*).

(*h*) Above, pp. 54, 147—150.

(*i*) *Re Terry and White's Contract*, 32 Ch. D. 14.

(*k*) Above, p. 55.

the property sold and that offered to be conveyed, provided that this be not something substantially different in kind from what was described in the contract (*l*). Thus, where property sold as "a messuage situate in T. Street, with the builder's yard, stables and premises, as lately in the occupation of F., and containing 1,372 square yards" really comprised 1,033 only, but otherwise answered the description, it was held that the vendor was entitled to enforce specific performance with compensation (*m*). And where the stipulation is that compensation for errors of description shall be allowed on either side, the vendor is entitled at law to claim compensation for an error innocently made to his own disadvantage (*n*). It is thought, however, that as regards the specific performance of the contract, the vendor could only enforce this with compensation in his own favour in the case of small errors and could not oblige the purchaser to take a property misdescribed by the vendor's own fault at a substantial increase on the price agreed upon (*o*). But it is considered that the purchaser could not in such case insist on specific performance by the vendor without allowing him compensation according to the agreement (*p*). It is established that, under a contract containing an agreement to give compensation for errors of description, the purchaser is not bound, either at law or in equity, to accept in fulfilment of the contract a substantially different sort of property from what he agreed to buy; the rule being that the agreement in question has no application if there be a misdescription which, "although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may

Re Fawcett and Holmes.

The rule in *Flight* v. *Booth.*

(*l*) *Price* v. *Macaulay*, 2 De G. M. & G. 339; *Re Fawcett and Holmes*, 42 Ch. D. 150; *Re Brewer and Hankins*, 80 L. T. 127.

(*m*) *Re Fawcett and Holmes*, ubi sup.

(*n*) *Leslie* v. *Tompson*, 9 Hare, 268; cf. above, p. 636.

(*o*) See 2 Dart, V. & P. 729, 730; *Price* v. *North*, 2 Y. & C. 620, 626.

(*p*) 2 Dart, V. & P. 730.

reasonably be supposed that, but for such misdescription, the purchaser might never have entered into in the contract at all" (*q*). Thus, where leaseholds were put up for sale as being subject to certain particular restrictive conditions, and under an agreement providing that compensation should be made for errors of description, and the restrictive covenants contained in the lease were of a more onerous nature than was so represented, it was held that the purchaser was entitled to rescind the contract and recover his deposit (*q*). The same law was applied where an essential part of property described as held for a term of twenty-three years was held from year to year only (*r*); where land sold as copyhold turned out to be freehold (*s*); where lands sold as leasehold were held by underlease (*t*); and where property described as a freehold ground rent was really a sum payable yearly under a covenant and not rent reserved on a demise of land (*u*). It appears, too, that where the deficiency is incapable of estimation at a pecuniary value, the condition in question is not applicable (*x*). And it is not applicable where the misdescription amounts to a wrongful misrepresentation; and this is the case although the error might well be the subject of compensation, if the misrepresentation had been innocent (*y*).

Extent of the condition for compensation.

In the cases above mentioned (*z*), where it was held that the agreement to give compensation was not

(*q*) *Flight* v. *Booth*, 1 Bing. N. C. 370.

(*r*) *Dobell* v. *Hutchinson*, 3 A. & E. 355.

(*s*) *Ayles* v. *Cox*, 16 Beav. 23.

(*t*) *Madeley* v. *Booth*, 2 De G. & Sm. 718. This case was adversely criticised by Jessel, M.R., in *Camberwell, &c. Socy.* v. *Holloway*, 13 Ch. D. 754, 760; but its authority was recognised in *Re Beyfus and Masters' Contract*, C. A. 39 Ch. D. 110; above, pp. 81, n. (*d*), 351.

(*u*) *Evans* v. *Robins*, 8 Jur. N. S. 846; see above, p. 377.

(*x*) *Brooke* v. *Rounthwaite*, 5 Hare, 298; *Ridgway* v. *Gray*, 1 Mac. & G. 109; Fry, Sp. Perf. 560, 561, 3rd ed., 534, 4th ed.; cf. above, pp. 637, 638.

(*y*) Above, p. 635, and n. (*g*).

(*z*) Above, nn. (*q*), (*r*), (*s*), (*t*), (*u*).

applicable if the property produced were an entirely different thing from that sold, it will be observed that the difference was in a matter of right, and not of physical content. In all those cases the words of the agreement were large enough to include a mere deficiency of estate or right. The common form of this condition provides for allowing compensation if any error, mis-statement or omission, be discovered in the particulars of sale (*a*); and it appears that these words are applicable (with the limitations above mentioned) to an error or mis-statement made in the particulars with regard to a matter of right as well as of physical content (*b*). But where the condition was that compensation should be made for errors of description in the *property*, it was held that this was only applicable to mistakes in describing the land sold and did not extend to defects of title, as where land sold as leasehold is held by underlease (*c*). And where the condition was in common form, and some property not belonging to the vendor was inadvertently included in the particulars, but the property as sold was conveyed to the purchaser on completion, and the mistake was not discovered until afterwards, it was held that the condition was not applicable to a defect of title so as to enable the purchaser to recover compensation under it *after completion* (*d*). But the real ground of this decision was that, where the whole of that which was sold has been actually conveyed, the entire contract is discharged, and, in the absence of fraud, no compensation is afterwards recoverable for a defect of title, except under

Debenham v. *Sawbridge.*

(*a*) 1 Davidson, Prec. Conv. 611, n., 4th ed.; 1 Key & Elph. Prec. Conv. 251, 7th ed.

(*b*) Thus, in *Re Fawcett and Holmes* (above, p. 640), it was held that the clause of compensation was applicable although the fact was that the vendor had no title to the land, which formed the difference between that sold and that offered in fulfilment of the contract. The vendor had formerly owned that land, but had parted with it before the contract, and had inadvertently sold by the old description.

(*c*) *Re Beyfus and Masters' Contract*, 39 Ch. D. 110; above, p. 641.

(*d*) *Debenham* v. *Sawbridge*, 1901, 2 Ch. 98.

covenants for title (*e*). And there appears to be no doubt that if in that case the mistake had been discovered before completion, compensation would have been payable under the condition (*f*).

Purchaser's rights under condition providing for compensation.

With respect to the purchaser's right to enforce the contract with compensation, where there is an express agreement to make compensation for errors of description, regard must of course be had to the exact terms of the agreement in each particular case: but the right so given does not in general exclude, or add or subtract anything to or from, the right to specific performance with compensation which the purchaser would have without it (*g*). His right in this respect under the express contract appears therefore to be generally subject to the like exceptions as the right given to him by the rules of equity under an open contract (*h*). But it has been held that where there is an express agreement to make compensation, the vendor is bound to allow it, notwithstanding that the purchaser had notice of the misdescription for which it is claimed (*i*). And it seems that where compensation is provided for by the parties' express contract, the Court will be less inclined to allow the vendor to resist specific performance with compensation on the ground of hardship than where the contract is open as regards compensation for misdescription (*k*). And as we have seen (*l*), under the express agreement, the purchaser may claim compensation for an error innocently made and not found out until after comple-

(*e*) Above, pp. 540, 576, 577.

(*f*) The error was exactly parallel to that committed in *Re Fawcett and Holmes* (above, pp. 640, 642, n. (*b*)). In one sense it was a mistake in describing the physical contents of the property sold: but the deficiency was in both cases due to the fact that the vendor had no title to part of the land described.

(*g*) Fry, Sp. Perf. § 1287, p. 575, 3rd ed., p. 548, 4th ed.; 2 Dart, V. & P. 741; see above, p. 636.

(*h*) Above, p. 637.

(*i*) *Lett* v. *Randall*, 49 L. T. 71; cf. above, pp. 164, 165, 354.

(*k*) See *Painter* v. *Newby*, 11 Hare, 26; Fry, Sp. Perf. 577, 3rd ed., 549, 4th ed.

(*l*) Above, pp. 55, 540: but see p. 642.

tion; which he could not otherwise obtain. Where the contract contained an express agreement to make compensation for any mistake in the description of the property or the vendor's interest therein, and also a proviso enabling the vendor to rescind if the purchaser persisted in any objection or requisition, and the vendor did not show a good title to some minerals included in the sale, it was held that he was entitled to rescind under the proviso on the purchaser's persisting in the objection to the title (*m*). As we have seen (*n*), it is now considered that where the contract empowers the vendor to rescind, if any requisition be insisted on which he is unwilling to comply with, he may well exercise this power without giving any reason for so doing, provided only that he act in good faith and not capriciously; and such a right of rescission appears to be exercisable, if the vendor have innocently made a serious error to his own disadvantage, notwithstanding that he have expressly agreed to make compensation for errors of description and that the error be one which would properly be the subject of compensation (*o*).

Neither party can enforce specific performance with an indemnity.

If land sold be subject to some incumbrance or liability, which the vendor cannot remove, neither the vendor nor the purchaser can enforce the specific performance of the contract on the terms that the vendor shall give an indemnity against the defect (*p*); unless, of course, the contract contain an express stipulation that such an indemnity shall be given and accepted.

Costs of the sale.

In connexion with the adjustment of accounts, the costs of the sale may be mentioned. As a rule, each party

(*m*) *Mawson* v. *Fletcher*, L. R. 10 Eq. 212, 6 Ch. 91.

(*n*) Above, pp. 54, 147—150.

(*o*) See *Re Terry and White's Contract*, 32 Ch. D. 14; *Ashburner* v. *Sewell*, 1891, 3 Ch. 405, 410.

(*p*) *Balmanno* v. *Lumley*, 1 V. & B. 224, 225; *Fildes* v. *Hooker*, 3 Madd. 193; *Aylett* v. *Ashton*, 1 My. & Cr. 105, 114; *Nouaille* v. *Flight*, 7 Beav. 521; *Ridgway* v. *Gray*, 1 Mac. & G. 109.

pays his own solicitor's costs: but, as we have seen (*q*), while the vendor must bear the expense of making the abstract, and producing all evidence of title in his own possession, the purchaser is bound, in the absence of stipulation to the contrary, to pay the expense of searching for, procuring and producing all evidence of title which is not in the vendor's possession. The purchaser, as a rule, bears the cost of preparing, making and perfecting the conveyance to himself; but the vendor must pay the expense of his own execution of the conveyance, including the charges of his solicitors and counsel for perusing and settling the conveyance on his behalf. This rule must, however, be read in connexion with the obligation, which is in strict law incumbent on the vendor, of getting in at his own cost prior to completion any part of the estate contracted to be sold, which is not vested in himself or in his own power (*r*). If it be necessary, in order to vest the whole estate contracted for in the purchaser, either that other persons than the vendor shall concur in the sale or that some act shall be done by the vendor, besides the mere conveyance of such estate as is his own or in his own power, and the outstanding estate be not got in or the act be not done before completion, then the vendor must, in the absence of stipulation to the contrary, pay the expense of the concurrence of such other necessary parties in the conveyance, or of the performance of the necessary act (*s*). And, as we have seen (*t*), he may in such circumstances be called upon to bear any additional expense of the preparation of the conveyance which is incurred by reason of part of the estate being outstanding in other persons than himself. For example, the vendor being *sui juris* and fully entitled, the purchaser must pay the expense of

(*q*) Above, pp. 27, 28, 34, 37, 66, 86, 96, 101, 102.

(*r*) See above, pp. 547, 548.

(*s*) Above, pp. 28, 38, 547, 548.

(*t*) Above, p. 548.

registration of the conveyance on a sale of land situate in a register county; for in such case the vendor's conveyance passes the whole legal estate to the purchaser, who registers for his own protection against third parties (*u*). So it is thought that the purchaser must pay the expense of registration of the title, where the land sold is situate in a compulsory district; for in such case the vendor's inability to convey the legal estate by deed upon a sale is owing not to any defect in his title, but to a requirement imposed by the legislature; and the rule is that the purchaser pays the cost of conveyance to himself, save only the expense of its execution by the vendor (*x*). But where the vendor is a tenant in tail selling the fee simple (*y*), and the estate tail is not barred before completion, he must bear the cost of the enrolment of the conveyance; for he has no power to convey the fee simple without barring the entail (*z*). And where a married woman is the vendor, or is a necessary party to the conveyance, and she can only convey by deed acknowledged, the expense of acknowledgment falls on the vendor; for her inability to convey otherwise than in this manner is a defect of the vendor's title (*a*). So, on the sale of copyholds, where the vendor is fully competent to convey the legal estate, the purchaser must bear the expense of the surrender and admittance (except in respect of the vendor's execution of the surrender), including the fine on admittance: but where the vendor or any other person must be admitted before a proper surrender to the purchaser's use can be made, the costs of and fines consequent upon such admittance must be paid by the vendor (*b*). And as we have seen (*c*), in the absence

(*u*) Above, pp. 362 *sq.*; *Mittelholzer* v. *Fullarton*, 6 Q. B. 989, 1019.

(*x*) Above, pp. 369—373.

(*y*) See above, p. 465.

(*z*) 2 Dart, V. & P. 798.

(*a*) 2 Dart, V. & P. 798.

(*b*) 2 Dart, V. & P. 801; above, pp. 349, 350.

(*c*) Above, pp. 28, 38, 56, 61 and n. (*x*), 547—549.

of stipulation to the contrary, the vendor must bear the expense of the concurrence in the conveyance of any mortgagees or incumbrancers or other persons, in whom is vested any part of the estate contracted to be sold. It has also been stated above (*d*) how the expenses of the execution of statutory acknowledgments and undertakings are to be borne.

If the vendor's interest in the contract or estate in the land sold have been transferred to any other person pending completion, as by his death, bankruptcy or otherwise (*e*), those who succeed to his rights are of course bound, if they complete the sale, to convey the whole estate contracted for and must at their own expense procure the conveyance to be executed by all necessary parties. And if by reason of any such transfer an application to the Court (as for a vesting order (*f*)) should be necessary in order to effect the required conveyance, those who stand in the vendor's place must bear all their own costs of the application (*g*). But if the purchaser should also be a necessary party to the application, as where the sale cannot be completed without an action for specific performance (*h*), it is held that where the application has been occasioned, not by the vendor's default, but by some cause beyond his control, as by his death or lunacy, the purchaser will not be allowed his costs of the application as against the vendor's representatives, and no costs will be given on either side (*i*). If, however, the application were made necessary by some default on the vendor's part, as where under the old law (*k*) he had by a will made *after* the contract devised

(*d*) Pp. 29, 39, 616.

(*e*) Above, pp. 461 *sq.*, 479, 491 *sq.*

(*f*) Above, pp. 469, 493.

(*g*) *Williams* v. *Glenton*, L. R. 1 Ch. 200, 207, 211.

(*h*) See above, p. 470.

(*i*) *Hanson* v. *Lake*, 2 Y. & C. C. C. 328; *Hinder* v. *Streeten*, 10 Hare, 18; *Bannerman* v. *Clarke*, 3 Drew. 632; *Cresswell* v. *Haines*, 8 Jur. N. S. 208; *Barker* v. *Venables*, 11 Jur. N. S. 480.

(*k*) See above, p. 462.

to an infant the land sold and had died pending completion, the vendor's representatives will be ordered to pay the purchaser's costs of the application (*l*).

§ 5.—*Of the Execution of the Conveyance.*

Completion.

We have now arrived at the subject of the actual completion of a sale of land. This usually takes place at the office of the vendor's solicitors (*m*); and the conveyance is either executed there and then, or else, having been previously executed by the vendor and all other necessary parties, if any, it is then handed over to the purchaser in exchange for payment by him of the amount due for the price and otherwise on the adjustment of accounts between the parties (*n*). And at the same time all the title deeds and other documents of title, which were in the vendor's possession and which he has no claim to retain (*o*), are delivered over to the purchaser. The purchaser must take care that he receives a conveyance duly executed by all the conveying parties and that he pays the purchase money to such person or persons only as are entitled to receive the same and can give a good discharge therefor. He must also ascertain, as we have seen (*p*), that there is no obstacle to his entering, immediately after completion, into actual possession or enjoyment of the property sold; and of course this should be done before payment of the purchase money. The vendor must see that he gets proper payment of the price.

Attestation of the conveyance by a

As regards the execution of the conveyance, it is enacted by the Conveyancing Act of 1881 (*q*) that on a

(*l*) *Wortham* v. *Dacre*, 2 K. & J. 437; *Purser* v. *Darby*, 4 K. & J. 41; *Sanderson* v. *Chadwick*, 2 N. R. 414; *Williams* v. *Glenton*, L. R. 1 Ch. 200, 207, 211.

(*m*) Above, p. 61.

(*n*) Above, pp. 626 *sq.*

(*o*) Above, pp. 602 *sq.*

(*p*) Above, pp. 538, 539.

(*q*) Stat. 44 & 45 Vict. c. 41, s. 8, applying only to sales made after the year 1881. Before this enactment, the law was that, *primâ facie*, a purchaser had no

sale the purchaser shall not be entitled to require that the conveyance to him be executed in his presence or in that of his solicitor, as such, but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor. It is thought that this enactment extends to the execution of the conveyance, not only by the vendor, but also by all other necessary parties. And where the conveying parties and their solicitors are unknown to the purchaser or his solicitors, it is a prudent precaution to insist on the exercise of the right so conferred, in order to avoid all risk of forgery or fraud (*r*). The vendor is bound, as a rule, to convey the land sold in person, and the purchaser cannot be required to accept the execution of the conveyance, on behalf of any necessary party, by attorney, except where circumstances make this course absolutely necessary (*s*). The objection to the execution of any document by attorney is of course that a power of attorney is in general revoked by the death (*t*), bankruptcy (*u*), or (it is said) insanity (*x*) of the donor of the power. Even if given for valuable consideration, such a power is revoked at common law by the donor's death (*y*), though not by his bankruptcy (*z*) or insanity (*a*), or if the donor

witness of the purchaser's choosing.

Vendor must convey in person.

Power of attorney when revoked.

right to require the vendor to execute the conveyance in the presence of himself or his solicitor: but in special circumstances he might require the vendor to do so, and the vendor was obliged to comply with such a requisition, if it were reasonable to make it. Whether this were so was a question of fact. See *Viney* v. *Chaplin*, 2 De G. & J. 468, 478; *Essex* v. *Daniell*, L. R. 10 C. P. 538.

(*r*) See *King* v. *Smith*, 1900, 2 Ch. 425, where a landowner's solicitor fraudulently procured him to execute a mortgage of his land; *Jared* v. *Clements*, 1903, 1 Ch. 428, a case of the forgery by a solicitor of a receipt for the money due on an equitable mortgage.

(*s*) *Mitchel* v. *Neale*, 2 Ves. sen. 679; *Noel* v. *Weston*, 6 Madd. 50; Sug. V. & P. 563; 2 Dart, V. & P. 641, 642.

(*t*) *Wallace* v. *Cook*, 5 Esp. 117; *Watson* v. *King*, 4 Camp. 272.

(*u*) *Hovill* v. *Lethwaite*, 5 Esp. 158; *Dawson* v. *Sexton*, 1 L. J. Ch. 185.

(*x*) Story on Agency, § 481.

(*y*) *Watson* v. *King*, 4 Camp. 272.

(*z*) *Winch* v. *Keeley*, 1 T. R. 619; *Alley* v. *Hotson*, 4 Camp. 325.

(*a*) Story on Agency, § 483.

were a woman, by her marriage (*b*): but it appears that equitable relief would be afforded against the revocation of such a power by death (*c*). And if the power were given for valuable consideration and expressly made exercisable after the donor's death in the names of his legal representatives, it appears that it would remain valid, both at law and in equity, after his death (*d*). By the Conveyancing Act, 1882 (*e*), a power of attorney given after that year for valuable consideration and expressed in the instrument creating the power to be irrevocable, is not revoked, invalidated or affected, in favour of a purchaser (*f*), by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, or by notice of any of these things. And by the same Act (*g*), a power of attorney given after that year and expressed in the instrument creating the power to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, is not revoked, invalidated or affected, in favour of a purchaser (*h*), by the same events or notice of them. When a purchaser accepts the execution of the conveyance by attorney on behalf of any necessary party, he should not allow the purchase money to be paid over into the entire control of the vendor's agent until he has received satisfactory proof of the validity of the power at the time at which it was acted on (*i*). And the best course appears to be to stipulate for the investment of the purchase money in the meantime in the names of trus-

Execution of the conveyance by attorney.

(*b*) *Parnham* v. *Hurst*, 8 M. & W. 743.

(*c*) See *Bromley* v. *Holland*, 7 Ves. 3, 28; *Brasier* v. *Hudson*, 9 Sim. 1, 10; *Spooner* v. *Sandilands*, 1 Y. & C. C. C. 390.

(*d*) *Pearson* v. *Amicable Assurance Office*, 27 Beav. 229, 233, 234; 8 Jarm. Conv. Pt. I. 39, 3rd ed.

(*e*) Stat. 45 & 46 Vict. c. 39, s. 8.

(*f*) See above, p. 258, n. (*x*), as to the meaning of *purchaser* in this Act.

(*g*) Sect. 9.

(*h*) See note (*f*), above.

(*i*) Sug. V. & P. 563.

tees, but at the vendor's risk (*k*). This course is unnecessary where the power of attorney is at the time of execution of the conveyance irrevocable and extends to authorize the purchase money to be paid to the donee of the power, and the purchaser is satisfied of the due execution by the vendor of the power of attorney. But it is thought that the vendor cannot oblige the purchaser to accept the execution of the conveyance by attorney on the ground that the power of attorney may be made irrevocable under the Conveyancing Act, 1882, where there is no other reason for the execution of the conveyance by attorney. Where the conveyance is to be executed by attorney, the power of attorney should be abstracted at the vendor's expense to enable the purchaser's counsel to advise upon its sufficiency; and it should be handed over to the purchaser on completion.

Execution of some title deed by attorney.

Here it may be mentioned that, if upon the investigation of title any of the deeds or documents of title appear to have been executed by attorney, the power of attorney ought to be abstracted and produced, and evidence must be furnished of the validity of the power at the time when it was exercised (*l*).

To whom the purchase money should be paid.

With respect to the payment of the purchase money to the proper persons, where the purchaser has notice of any incumbrance on the property sold, he must not pay the purchase money to the vendor, but must take care that the amount due to the incumbrancers in respect of their charges is paid to them direct (*m*); and not until all such claims have been satisfied should the surplus, if any, be paid to the vendor. As a rule, where money is payable to any one, payment must be made to him in person; payment to his solicitor, banker or

(*k*) 2 Dart, V. & P. 748.

(*l*) Sug. V. & P. 417; 1 Dart, V. & P. 352, 353; *Eaton* v. *Sanxter*, 6 Sim. 517, 519.

(*m*) See above, pp. 249 *sq.*, 490, 497, 498, 553.

other agent is no discharge, unless he expressly or impliedly authorised such payment (*n*). But on the completion of sales of land, the conveying party's solicitor is usually authorised to receive the money payable to him by the effect of the 56th section of the Conveyancing Act of 1881 (*o*). This provides that, where a solicitor produces a deed having in the body thereof or indorsed thereon a receipt for consideration money or other consideration (*p*), the deed being executed or the indorsed receipt being signed by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any other authority in that behalf. It is considered that, under this enactment, the production by a solicitor of such a deed as above mentioned has the same effect as, and no greater virtue than, an express authority to the solicitor to receive the money; and it was therefore held that, on a sale by trustees, the purchaser might decline to act on the authority so conferred, because it would in general be a breach of trust for trustees to allow their solicitor to receive purchase money payable to them (*q*). But it was afterwards enacted by the Trustee Act, 1888 (*r*), now replaced in this respect by the Trustee Act, 1893 (*s*), with respect to the receipt of money or valuable consideration or property after the 24th of December, 1888, that a trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting

Solicitor's authority to receive the purchase money on production of the conveyance.

On a sale by trustees.

(*n*) *Wilkinson* v. *Candlish*, 5 Ex. 91; *Viney* v. *Chaplin*, 2 De G. & J. 468, 477, 481; *Bourdillon* v. *Roche*, 27 L. J. N. S. Ch. 681; *Catterall* v. *Hindle*, L. R. 2 C. P. 368; *Withington* v. *Tate*, L. R. 4 Ch. 288; *Expte. Swinbanks*, 11 Ch. D. 525.

(*o*) Stat. 44 & 45 Vict. c. 41.

(*p*) Above, p. 616, and n. (*q*).

(*q*) *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387.

(*r*) Stat. 51 & 52 Vict. c. 59, s. 2.

(*s*) Stat. 56 & 57 Vict. c. 53, s. 17.

the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in section 56 of the Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust, by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee. Since the law has been so altered, the purchaser on a sale of land by trustees may safely pay the purchase money to the trustees' solicitor on his producing the deed of conveyance containing a receipt and executed by them (*t*).

Where the conveyance is executed by attorney.

Where a conveyance on sale is executed by attorney (*u*) the 56th section of the Conveyancing Act, 1881, does not authorise the payment of the purchase money to the solicitor of the *attorney;* it only operates as an authority from the principal for payment to his own solicitor (*t*). And where the conveyance is to be executed by attorney, and the attorney is expressly authorised to receive the purchase money, it must be paid to him in person (*u*). Here it may be noted that, if it be arranged that the conveyance shall be executed by attorney, as where the vendor is obliged to go abroad in the service of the Crown or on business before completion (*x*), the power of attorney should be expressed to be irrevocable for a fixed time under the Conveyancing Act, 1882 (*y*), and should, if the vendor be not a trustee, either authorise the attorney to receive the purchase money (in which case it must be paid to him

(*t*) *Re Hetling and Merton's Contract*, 1893, 3 Ch. 269, 276, 280.

(*u*) Above, pp. 649, 650.

(*x*) See above, pp. 649—651. If the vendor, being in the service of the Crown, were ordered to go abroad before completion, that would seem to be a case where the purchaser would be bound to accept execution of the conveyance by attorney.

(*y*) Above, p. 650.

in person) or appoint some solicitor therein named to be the principal's solicitor to receive the money on production of the executed deed of conveyance. If the principal be a trustee, he may well appoint an attorney to execute the conveyance for him (*z*): but in such case the power of attorney should follow the words above set out of the Trustee Act, 1893 (*a*), and appoint some solicitor to receive the purchase money on his behalf by producing the deed of conveyance under section 56 of the Conveyancing Act, 1881. This course, being authorised by statute, is free from objection; whilst a trustee may not otherwise expressly authorise his solicitor to receive purchase money for him except in a case of necessity (*b*).

Payment should be made to the solicitor acting for the person entitled to give a receipt.

It appears that the solicitor referred to in the 56th section of the Conveyancing Act, 1881 (*c*), is in general the solicitor acting on behalf of the person entitled to give a receipt for the money or other consideration (*d*). Thus, where the purchase money is partly payable to incumbrancers, the purchaser should not, it is thought, pay over the whole of the purchase money to the vendor's solicitor producing the deed of conveyance duly executed (*e*), without good independent evidence that he was authorised to act in this respect on the incumbrancers' behalf. But, of course, payment of the amount due to the incumbrancers may be paid to their solicitor on his producing the conveyance executed by them. Where a solicitor, who produces such a deed as is mentioned in that section (*f*), is ostensibly acting for the person entitled to give a receipt for the con-

Payment to solicitor ostensibly acting for a conveying party.

(*z*) *Re Hetling and Merton's Contract*, 1893, 3 Ch. 269, 280.

(*a*) Above, p. 652.

(*b*) *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387, 394, 400, 403, 404.

(*c*) Above, p. 652.

(*d*) *Day* v. *Woolwich, &c. Socy.*, 40 Ch. D. 491; *Re Hetling and Merton's Contract*, 1893, 3 Ch. 269, 280.

(*e*) Above, p. 651.

(*f*) Above, p. 652.

sideration money, it appears that the purchaser, in the absence of any ground for suspicion, is not entitled to require any independent proof that the solicitor is indeed authorised to act and is rightly acting as solicitor for that person (*g*). And if that person in any way held out the solicitor as his agent, he would be estopped from proving that he did not in fact authorise the solicitor to receive the money on production of the deed. Thus, where a solicitor fraudulently induced a client to execute a mortgage of his land and obtained the mortgage money by producing the mortgage deed so executed and made away with the money, but it was proved that the client placed such confidence in the solicitor that he would execute any deed on the solicitor's recommendation without insisting that the transaction should be explained to him, it was held that he was estopped from showing that the solicitor was not in truth empowered to act as his solicitor in the matter of receiving the money (*h*). But it does not appear that a purchaser would be protected in paying money to a solicitor ostensibly acting under the authority conferred by section 56 of the Conveyancing Act, 1881, if the solicitor had no real authority so to act, and the person to whom the money was payable had not by his conduct or otherwise held out the solicitor to be his agent (*i*). In all cases where money is paid to a solicitor in reliance on this enactment, the deed must be actually produced at the time of payment to justify the purchaser in making payment to the solicitor (*k*). Where a creditor or other person entitled to receive money authorises payment to be made to his solicitor, it appears that payment to the solicitor's managing clerk is, as a rule,

King v. *Smith.*

The deed must be produced at the time of payment.

Payment to the solicitor's clerk.

(*g*) See *Re Hetling and Merton's Contract*, 1893, 3 Ch. 269, 280; *King* v. *Smith*, 1900, 2 Ch. 425, 432.

(*h*) *King* v. *Smith*, 1900, 2 Ch. 425.

(*i*) See *Re Hetling and Merton's Contract*, 1893, 3 Ch. 269, 280; above, p. 654.

(*k*) *Day* v. *Woolwich, &c. Soc.*, 40 Ch. D. 491.

a good payment (*l*); and this rule seems applicable where the authority to pay to the solicitor is given by virtue of the enactment above cited (*m*).

What is a proper payment.

With respect to the vendor's securing for himself proper payment, he is of course only bound to accept banknotes or coins, which are legal tender (*n*); he may object to take a cheque or any other negotiable security (*o*). At the present time sales of land are frequently completed by means of bankers' drafts (*p*), to avoid the risk and inconvenience of carrying about banknotes of large amount; but the vendor is not obliged to accept this mode of payment, and it should be ascertained before the time fixed for actual completion that he will make no objection to it. Where a solicitor is authorised to receive the purchase money or any part of it on behalf of the vendor or any other conveying party (*q*), he is not at liberty to accept payment otherwise than in cash or notes being legal tender (*r*). This is another reason for ascertaining beforehand that no objection will be made to a banker's draft, if it be desired to tender such a draft in payment.

Effect of the execution of the conveyance.

The execution of the conveyance gives to the purchaser, in the case of freeholds the legal seisin, and in the case of leaseholds the like possession of the land

(*l*) See *Moffat* v. *Parsons*, 5 Taunt. 307; *Wilmot* v. *Smith*, 3 Car. & P. 453; *Bingham* v. *Allport*, 1 N. & M. 398; *Kirton* v. *Braithwaite*, 1 M. & W. 310; *Watson* v. *Hetherington*, 1 Car. & K. 36; *Hemming* v. *Hale*, 29 L. J. (N. S.) C. P. 137; *Finch* v. *Boning*, 4 C. P. D. 143.

(*m*) Above, p. 652.

(*n*) Current gold coin is legal tender for any amount; Bank of England notes for all sums above 5*l*., except by the Bank itself, but not in Ireland; current silver coin for not more than 40*s*.; bronze for not more than 1*s*.: stats. 3 & 4 Will. IV. c. 98, s 6; 8 & 9 Vict. c. 37, s. 6; 33 Vict. c. 10, ss. 4, 20.

(*o*) *Blumberg* v. *Life Interests, &c. Corpn.*, 1897, 1 Ch. 171; *Johnston* v. *Boyes*, 1899, 2 Ch. 73.

(*p*) *I.e.*, drafts drawn by bankers on themselves or branches of their office.

(*q*) Above, p. 652.

(*r*) *Papé* v. *Westacott*, 1894, 1 Q. B. 272.

sold (*s*); and he is thenceforth free to enter into actual possession or receipt of the rents and profits of the property purchased (*t*). On the sale of copyholds, admittance is necessary to vest in the purchaser the *legal* title to possession: but on admittance being obtained, the purchaser's legal title will relate back to the surrender (*u*).

(*s*) See Wms. Real Prop. 201, 533, 19th ed.; Williams on Seisin, 5, 54. On the question whether the purchaser obtains a seisin in law or an actual seisin where he is *in* under the Statute of Uses and not at common law, see Williams on Settlements, 11—16; Wms. Real Prop. 172 and n. (*l*), 175, n. (*z*).

(*t*) Above, pp. 448, 450, 509.

(*u*) *Doe* d. *Bennington* v. *Hall*, 16 East, 208; 1 Wat. Cop. 125, 128, 4th ed.

APPENDIX.

FORM OF CONTRACT FOR PRIVATE SALE OF FREEHOLD LAND, WITH STIPULATIONS NOT SETTLED EXCLUSIVELY IN THE VENDOR'S INTEREST (*a*).

ARTICLES OF AGREEMENT made this ——— day of ———, 1903, BETWEEN A. B., of [*insert description*] (hereinafter referred to as "the vendor"), of the one part, and C. D., of [*insert description*] (hereinafter referred to as "the purchaser"), of the other part. IT IS HEREBY AGREED between the said parties hereto as follows (that is to say):—

Agreement for sale.

1. The vendor shall sell and the purchaser shall buy at the price of ———*l.* the freehold in fee simple, subject to the tenancies specified in the schedule hereto but otherwise free from incumbrances, of all those lands tenements and hereditaments particularly described in the schedule hereto.

Deposit.

2. The purchaser shall immediately upon signing this agreement pay the sum of ———*l.* (*b*) as a deposit and in part payment of the purchase money into the hands of Messrs. ———, of [*insert address of office*] the vendor's solicitors, who shall receive and hold the same as stakeholders (*c*).

Fixtures and timber to be taken at a valuation.

3. The fixtures in the house known as ——— Hall, ———, and the landlord's fixtures in the farmhouses at ——— Farm and ——— Farm, and the timber and other

(*a*) See above, pp. 65—74.
(*b*) Usually 10 per cent. of the purchase money.
(*c*) See above, pp. 23, 69.

trees, tellers, pollards, saplings and underwood upon the whole property sold down to the value of 1*s.* per stick shall be paid for by the purchaser at a valuation, &c. [*continue as in Condition* 3, *p.* 59, *above*] (*d*).

Commencement of title.

4. The title shall commence with an indenture dated &c., and made between, &c. [*for example, a deed dated thirty-two years before the contract*], the vendor undertaking that the said indenture shall prove to be a good root of title (*e*).

Vendor to produce at his own expense all documents in possession of mortgagees.

5. The vendor shall pay all such expenses of the production for verification of the abstract and the examination by the purchaser's solicitors of any documents which the purchaser can require to be abstracted and which are in the possession of any mortgagee or other incumbrancer, as the vendor would be bound to pay if the said documents were in his own possession (*f*).

Time limited for delivery of abstract and making requisitions on title, &c.

6. The vendor shall send an abstract of his title to the purchaser's solicitors within fourteen days from the present date, and the purchaser shall send his requisitions and objections (if any) in respect of the title and all matters appearing on the abstract or this agreement to the office of ———, at ———, aforesaid of the vendor's said solicitors within twenty-one days after the day of the delivery of the abstract, and in these respects time shall be of the essence of the contract (*g*). In default of or subject only to any such requisitions and objections so made, the purchaser shall be taken to have accepted the title.

Reservation to vendor of right to rescind the contract.

7. If the purchaser shall insist on any requisition or objection as to the title, evidence of title, conveyance, possession, receipt of rents or any other matter appearing on the abstract or this agreement or connected with the sale which the vendor shall be unable or on the ground of expense or other reasonable ground (*h*) unwilling to remove or comply with, the vendor shall be at liberty, notwithstanding any negotiation or litigation in respect of such

(*d*) See above, pp. 50, 70.
(*e*) See above, p. 71.
(*f*) See above, p. 72.
(*g*) See above, p. 71.
(*h*) See above, p. 71.

requisition or objection, to give to the purchaser or his solicitors notice in writing of his intention to rescind the contract for sale unless such requisition or objection be withdrawn; and if such notice be given and the requisition or objection be not withdrawn within ten days after the day on which the notice was sent, the contract shall without further notice be rescinded. The vendor shall thereupon return to the purchaser his deposit, but without any interest, costs of investigating the title, or other compensation or payment whatever.

Identity.

8. The purchaser shall admit the identity of the property purchased with that comprised in the muniments offered by the vendor as the title to such property upon the evidence afforded by a comparison of the descriptions contained in the schedule hereto and in the muniments, together with a statutory declaration, to be made at the vendor's expense by some person acquainted with the property and the facts, that the property purchased has been enjoyed in accordance with the abstracted title for the twenty years next before the present date (*i*).

Compensation for errors of description.

9. The property is believed and shall be taken to be correctly described as to quantity and otherwise. The property is sold subject to all chief and other rents, rights of way and water, and other easements (if any) charged or subsisting thereon, and to all leases, tenancies and occupations, whether mentioned in the schedule hereto or not; and to all rights and claims of lessees, tenants and occupiers (*k*). If any error, misstatement, or omission be discovered in the schedule hereto, the same shall not annul the sale, but reasonable compensation shall, if demanded in writing prior to the completion of the purchase but not otherwise (*l*), be allowed by the vendor or the purchaser, as the case may require, in respect thereof, and the amount of such compensation shall in case of dispute be settled by two arbitrators or their umpire pursuant to the Arbitration Act, 1889.

(*i*) See above, p. 72.
(*k*) See above, p. 61, n. (*w*).
(*l*) See above, pp. 72, 539, 540, 634—644.

Completion.

10. The purchaser shall pay the remainder of his purchase money, and the value of the fixtures, timber and other trees, tellers, pollards, saplings, and underwood, on the ——— day of ——— next, at the office aforesaid of the vendor's said solicitors, to the vendor or as he shall in writing or otherwise duly authorize. Upon such payment the vendor and all other necessary parties (if any) will execute a proper assurance of the property to the purchaser. Such assurance shall be prepared by and at the expense of the purchaser (*m*); and the draft thereof shall be delivered at the office aforesaid for perusal and approval on behalf of the vendor not less than one calendar month (*n*) before the ——— day of ——— next, and the engrossment thereof shall be delivered at the same office for execution by the vendor not less than seven days before the ——— day of ——— next.

Rents, outgoings, &c.

11. The rents will be received, possession retained, and the outgoings discharged by the vendor up to the said ——— day of ——— next. As from that day the outgoings shall be discharged, the rents received, and possession taken by the purchaser. The rents and outgoings shall, if necessary, be apportioned between the vendor and the purchaser for the purpose of this condition (*o*).

Interest.

12. If the purchase shall not be completed on the said ——— day of ——— next, the purchaser shall pay interest on the remainder of his purchase money and on the aforesaid value of the fixtures, timber and other trees, tellers, pollards, saplings, and underwood, at the rate of 4*l.* per cent. per annum from that day until the purchase shall be completed; provided that if the delay in completion shall arise from any other cause than the purchaser's own neglect or default,† he shall be at liberty at his own risk to place the balance of the purchase money and the amount

(*m*) See above, p. 73.

(*n*) In contracts for the sale of land the word *month* means *primâ facie* a lunar month, but will mean a calendar month if it can be shown, either from the context or from surrounding circumstances, that such was the intention of the parties: *Lang* v. *Gale*, 1 M. & S. 111; *Simpson* v. *Margitson*, 11 Q. B. 23; Sug. V. & P. 257; 1 Dart, V. & P. 492.

(*o*) See above, p. 73.

† See Re Bayley-Worthington & Roberts' Contract, 100 L.T.R. 650 (1909).

(so soon as ascertained) of any valuation to be made under this agreement in some bank to a deposit account and to give to the vendor or his solicitors notice in writing of such deposit, and after such deposit and notice he shall not be chargeable with interest on any purchase money so deposited at a higher rate than shall be allowed thereon by the bank (*p*).

SCHEDULE.

[*Containing a detailed description of the property sold and specifying the various tenancies under which the same is occupied.*]

(*p*) See above, pp. 73, 74.

END OF FIRST VOLUME.

LONDON:
PRINTED BY C. F. ROWORTH, GREAT NEW STREET, E.C.

JAN 29 1952

LAW LIBRARY
UNIVERSITY OF CALIFORNIA
LOS ANGELES

County Courts.—The Annual County Courts Practice; containing the Jurisdiction and Practice under the County Courts Act, the Bills of Exchange Act, and the Employers' Liability Act, and the Statutes and Rules of Practice. By His Honour Judge SMYLY. 2 vols. 25*s.*

Covenants.—Covenants running with Land. By R. CUTHBERT BROWN. 10*s.* 6*d.* 1907.

Criminal Law.—ARCHBOLD'S (J. F.) Pleading, Evidence and Practice in Criminal Cases, with the Statutes and Precedents of Indictments. 23rd Edit. By W. F. CRAIES and G. STEPHENSON. 1*l.* 15*s.* 1905.

Mew's Digest of Cases relating to Criminal Law to the end of 1897. 25*s.* 1898.

RUSSELL (Sir W. O.) on Crimes and Misdemeanours. 6th Edit. 3 vols. 5*l.* 15*s.* 6*d.* 1896.

ROSCOE'S (H.) Digest of the Law of Evidence in Criminal Cases. 12th Edit. By A. P. KEEP. 1*l.* 11*s.* 6*d.* 1898.

Deeds.—NORTON on Deeds. Being a 2nd Edit. of ELPHINSTONE ON DEEDS. By F. NORTON, K.C. 30*s.* 1906.

KELKE'S Epitome of Rules for Interpretation of Deeds. 6*s.* 1901.

Dictionary.—The Judicial Dictionary, or Interpreter of Words and Phrases by the British Judges and Parliament. By F. STROUD. 2nd Edit. 3 vols. £4 4*s.* 1903.

Digest of English Case Law (The).—Superseding and Consolidating all previous Digests of the Reports down to the end of 1897, including a selection of Irish Cases. By JOHN MEWS, assisted by Nineteen other Barristers-at-Law. 20*l.* 1898.

Continued annually.

A Digest of Cases Overruled, &c., in the English Courts. By W. A. G. WOODS and J. RITCHIE. 3 vols. £5 5*s.* 1907

Divorce. — BROWNE & POWLES' Law and Practice in Divorce and Matrimonial Causes; with the Statutes, Rules, Fees and Forms. 7th Edit. 25*s.* 1905.

Easements.—GALE on Easements. 7th Edit. By G. CAVE. 25*s.* 1899.

BLYTH'S Epitome of the Law of Easements. By T. T. BLYTH, Barrister-at-Law. 6*s.* 1905.

Ecclesiastical Law. — Phillimore's Ecclesiastical Law of the Church of England. By Sir ROBERT PHILLIMORE. 2nd Edit. 2 vols. 3*l.* 3*s.* 1895.

Ejectment.—WILLIAMS (J. H.) and YATES' (W. B.) Law of Ejectment. 16*s.* 1894.

Elections.—JELF'S Corrupt and Illegal Practices at Elections. By E. A. JELF, B.A. 3rd Edit. 7*s.* 6*d.* 1905.

Employer's Liability. — DAWBARN'S Employer's Liability to their Servants at Common Law and under the Employer's Liability Act, 1880, and Workmen's Compensation Act, 1906. 3rd Edit. 15*s.* 1907.

Equity.—WHITE & TUDOR'S Selection of Leading Cases in Equity, with Notes. 7th Edit. By T. SNOW and W. F. PHILLPOTTS. 2 vols. 3*l.* 15*s.* 1897.

KELKE'S Epitome of Leading Cases in Equity, founded on White and Tudor. 6*s.* 1901.

Evidence.—TAYLOR'S (PITT) Treatise on the Law of Evidence, as administered in England and Ireland. 10th Edit. By W. E. HUME-WILLIAMS, K.C. In 2 vols. 3*l.* 3*s.* 1906.

BEST'S Principles of Evidence. 10th Edit. By J. M. LELY. 25*s.* 1906.

COCKLE'S Leading Cases on the Law of Evidence. By E. COCKLE. 7*s.* 6*d.* 1907.

Executors. — WILLIAMS' (Sir E. V. and A. R. INGPEN). Treatise on the Law of Executors and Administrators. 10th Edit. 4*l.* 1905.

Forms and Tables.—ROUSE'S Practical Man. 17th Edit. Giving many extra Instructions, Forms, Rules and Tables. By E. E. H. BIRCH. 10*s.* 6*d.* 1900.

CHITTY'S Forms of Proceedings in the King's Bench Division, and on appeal therefrom. 13th Edit. 36*s.* 1902.

Fraud.—KERR'S Treatise on the Law of Fraud and Mistake. 3rd Edit. By S. E. WILLIAMS. 25*s.* 1902.

Horses.—Oliphant's Law of, including the Law of Innkeepers, Veterinary Surgeons, &c., and of Hunting, Racing, Wagers and Gaming. 5th Edit. By CLEMENT ELPHINSTONE LLOYD. 21*s.* 1896.

Husband and Wife.—MACQUEEN on Husband and Wife. The rights and liabilities of Husband and Wife. 4th Edit. By WYATT PAINE. 25*s.* 1905.

Injunctions.—KERR on the Law and Practice of Injunctions. 4th Edit. By E. P. HEWITT, S. E. WILLIAMS, and J. M. PATERSON. 35*s.* 1903.

Interpleader.—Law and Practice of Interpleader in the High Court and County Courts. With Forms, &c. By M. CABARÉ. 3rd Edit. 6*s.* 1900.

Justices.—WIGRAM'S Justices' Note Book. 7th Edit. 10*s.* 6*d.* 1900.

Landlord and Tenant.—WOODFALL'S Law of Landlord and Tenant. 17th Edit. By J. M. LELY. 38*s.* 1902.

Leading Cases. — SMITH'S Leading Cases. 11th Ed. By T. W. CHITTY, H. CHITTY and J. HERBERT WILLIAMS. £3 10*s.* 1903.

Fifteen Decisive Battles of the Law. By E. A. JELF. 3*s.* 6*d.* 1903.

Licensing.—Licensing Law.—So far as it relates to the Sale of Intoxicating Liquors, Theatres, Dancing, etc. By R. M. MONTGOMERY. 3rd Edit. 12*s.* 6*d.* 1905.

TALBOT'S Law and Practice of Licensing. Being a Digest of the Law regulating the Sale by Retail of Intoxicating Liquors, with a full Appendix of the Statutes and Forms. By GEORGE JOHN TALBOT, Barrister-at-Law. 2nd Edit. 10*s.* 6*d.* 1905.

Local Government. — WRIGHT and HOBHOUSE'S Outlines of Local Government and Local Taxation. 3rd Edit. By the Rt Hon. HENRY HOBHOUSE and E. L. FANSHAWE. 7*s.* 6*d.* 1906.

Master and Servant.—SMITH'S Law of Master and Servant, including therein Masters and Workmen in every description of Trade and Occupation. 6th Edit. 30*s.* 1905.

Maxims.—Broom's (Dr.) Selection of Legal Maxims. Classified and Illustrated. 7th Ed. by H. F. MANISTY and H. CHITTY. 28*s.* 1900.

UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 842 586 0

Mercantile Law. — SMITH'S. Compendium of Mercantile Law. By E. LOUIS DE HART and R. I. SIMEY. 11th Edit. 2 vols. 2*l.* 2*s.* 1905.

Merchant Shipping.—A Treatise on the Law of Merchant Shipping. 4th Edit. By DAVID MACLACHLAN, M.A. 2*l.* 2*s.* 1892.

MARSDEN'S Digest of Cases relating to Shipping, Admiralty, and Marine Insurance to the end of 1897. 30*s.* 1899.

Mining.—MACSWINNEY (R. F.) on the Law of Mines, Minerals and Quarries. 3rd Edit. 2*l.* 2*s.* 1907.

Mortgages.—COOTE'S Treatise on the Law of Mortgages. 7th Edit. 3*l.* 3*s.* 1904.

Municipal Corporations.—RAWLINSON'S Municipal Corporations Acts. 9th Edit. By J. F. P. RAWLINSON, K.C., and J. A. JOHNSTON. 2*l.* 2*s.* 1903.

Nisi Prius.—ROSCOE'S (H.) Digest of the Law of Nisi Prius Evidence. 17th Edit. 2 vols. 2*l.* 2*s.* 1900.

Partnership.—LINDLEY'S Treatise on the law of Partnership. 7th Edit. By Judge LINDLEY. 38*s.* 1905.

Patents.—TERRELL'S Law and Practice relating to Letters Patent for Inventions. 4th Edit. 30*s.* 1906.

Personal Property.—GOODEVE'S Modern Law of Personal Property. 4th Edit. By J. HERBERT WILLIAMS. 18*s.* 1904.

KELKE'S Epitome of Personal Property Law. 2nd Edit. 6*s.* 1905.

WILLIAMS' (JOSHUA) Principles of the Law of Personal Property. 16th Edit. 21*s.* 1906.

Pleading. — BULLEN and LEAKE'S Precedents of Pleadings in Actions in the King's Bench Division of the High Court of Justice. With Notes and Rules relating to Pleading. 6th Edit. By C. DODD, K.C., and T. WILLES CHITTY. 38*s.* 1905.

Practice. — Stringer's A B C Guide to the Practice of the Supreme Court. 5*s.* net.

Prescription.—CARSON'S Prescription and Custom. By T. H. CARSON, K.C. 6*s.* 1907.

Privy Council.—Practice of the Privy Council on Appeals from British and Colonial Courts. With Forms and Precedents. By F. STAFFORD and G. WHEELER. 2*l.* 10*s.* 1901.

Probate.—POWLES AND OAKLEY on the Law and Practice relating to Probate and Administration. 4th Edit. By L. D. POWLES, W. M. F. WATERTON, and E. L. MANSBRIDGE. 30*s.* 1906.

Real Property.—WILLIAMS' Principles of the Law of Real Property. 20th Edit. By T. C. WILLIAMS. 21*s.* 1906.

GOODEVE'S Modern Law of Real Property. 5th Edit. By Sir H. W. ELPHINSTONE. 21*s.* 1906.

An Epitome of Real Property Law, for the Use of Students. By W. H. HASTINGS KELKE, M.A. 4th Edit. 6*s.* 1907.

CARSON'S Real Property Statutes. 10th Edit. By T. H. CARSON, K.C., assisted by H. B. BOMPAS. 35*s.* 1902.

Receivers.—KERR'S Law and Practice as to Receivers appointed by the Court of Chancery. 5th Edit. By W. DONALDSON RAWLINS, K.C. 10*s.* 1905.

Registration. — MOLONEY'S Registration of Voters. By M. MOLONEY, Revising Barrister. 2nd Edit. 7*s.* 6*d.* 1907.

Restraint of Trade.—MATTHEWS and ADLER. Law relating to Covenants in Restraint of Trade. 2nd Edit. 7*s.* 6*d.* 1907.

Roman Law.—KELKE'S Epitome of Roman Law. 6*s.* 1901.

Sale.—BENJAMIN'S (J. P.) Treatise on the Law of Sale of Personal Property, with reference to the American Decisions and the French Code and Civil Law. 5th Edit. By W. F. A. KER and A. R. BUTTERWORTH. £2 2*s.* 1906.

Sheriff Law.—MATHER'S (P. E.) Sheriff and Execution Law. 2nd Edit. 30*s.* 1903.

Solicitors.—ATKINSON on Solicitors' Liens and Charging Orders, including all the Cases, Forms of Summonses, Notices of Motion and other Procedure. By F. W. ATKINSON, LL.D. 7*s.* 6*d.* net. 1905.

Statutes.—CHITTY'S Statutes of Practical Utility. New Edit. By J. M. LELY. Magna Charta to 1901. 14 vols. 15*l.* 15*s.* Continued by Annual Supplements.

MAXWELL on the Interpretation of Statutes. 4th Edit. 25*s.* 1905.

Support and Subsidence.—BANKS. A Treatise on the Law of Support for Land, Buildings, and Public Works. By G. BANKS. 12*s.* 1894.

Title.—Hints as to Advising on Title. 4th Edit. By W. H. GOVER. 9*s.* 1905.

Torts.—The Law of Torts. By J. F. CLERK and W. H. B. LINDSELL. 4th Edit. By WYATT PAINE. 30*s.* 1906.

FRASER'S Compendium of the Law of Torts. 5th Edit. 8*s.* 1902.

Trade Marks.—A Treatise on the Law of Trade Marks, Trade-Name, and Merchandise Marks. By D. M. KERLY. 2nd Edit. 35*s.* With Supplement 1901–6.

Trade Unions.—Trade Union Law and Cases. 2nd Edit. By H. COHEN and G. HOWELL. 6*s.* net. 1907.

Trusts.—LEWIN'S (THOMAS) Practical Treatise on the Law of Trusts. 10th Edit. 2*l.* 2*s.* 1898

Vendor and Purchaser.—Law relating to Vendors and Purchasers of Real Estate and Chattels Real. By T. CYPRIAN WILLIAMS. 2 vols. £2 5*s.* 1906.

Waters. Law of Waters, Sea, Tidal, and Inland. By H. J. W. COULSON and U. A. FORBES. 2nd Edit. 35*s.* 1902.

Wills.—JARMAN'S (T.) Treatise on Wills. 5th Edit. 2 vols. 3*l.* 10*s.* 1893.

HAYES (W.) and JARMAN'S (T.) Concise Form of Wills; with Practical Notes. 12th Edit. By J. B. MATTHEWS. 21*s.* 1905.

Workmen's Compensation. — *See* Employer's Liability.